Supreme Court, U.S.
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No.

In the Supreme Court of the United States

October Term, 1994

THOMAS C. PREVETIRE,
Petitioner-Claimant,

v.

WEYHER/LIVSEY CONSTRUCTORS, INC.,
Respondent-Employer,

and

WAUSAU INSURANCE COMPANY,
Respondent-Carrier.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employee involved in the construction of a steam and electrical power plant, whose primary purpose was to provide power for ship repair work at the Norfolk Naval Shipyard, is a "maritime employee" under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq.?

PARTIES TO THE PROCEEDING

1. Thomas C. Prevetire was the claimant in the proceedings before the Benefits Review Board of the U.S. Department of Labor, and Weyher-Livsey Constructors, Inc., was the employer. The Director of Office of Worker's Compensation Programs in the U.S. Department of Labor noticed its appearance in this claim and supported the position that Prevetire had met the jurisdictional requirements of the Longshore Act.

2. Weyher-Livsey Constructors, Inc., was the appellant in the proceedings before the United States Court of Appeals for the Fourth Circuit, and Thomas C. Prevetire was the Appellee. The Director of Office of Worker's Compensation Programs in the U.S. Department of Labor was also named as Appellee and again supported the position that Prevetire had met the jurisdictional requirements of the Longshore Act.

TABLE OF CONTENTS

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT 3

REASONS FOR GRANTING THE PETITION . . . 6

CONCLUSION 32

APPENDIX A . . . . . (1a)

APPENDIX B . . . . . (14a)

APPENDIX C . . . . . (16a)

APPENDIX D . . . . . (24a)

APPENDIX E . . . . . (34a)

TABLE OF AUTHORITIES

Cases:

Alabama Dry Dock & Shipbuilding Co. v. Kininess,
554 F.2d 176 (5th Cir.),
cert. denied, 434 U.S. 903,
98 S.Ct. 299, 54 L.Ed.2d 190 (1977) 17

Boudloche v. Howard Trucking Co., Inc.,
632 F.2d 1346 (5th Cir. 1980),
cert. denied, 452 U.S. 915,
101 S.Ct. 3049, 69 L.Ed.2d 418 (1981) 17

Bradshaw v. McCarthy,
3 BRBS 195 (1976), *petition for*
review denied, 547 F.2d 1161
(3d Cir. 1977) 17

Campbell v. Sonat Offshore Drilling, Inc.,
797 F.2d 1115 (5th Cir. 1992) 12

Chesapeake & Ohio Ry. Co. v. Schwalb,
439 U.S. 40, 107 L.Ed.2d 278,
110 S.Ct. 381 (1989) 4, 13

Conti v. Norfolk & Western Rwy. Co.,
566 F.2d 890, 895 (4th Cir. 1977) 4

Fontenot v. AWI, Inc.,
923 F.2d 1127 (1991) 9

Graziano v. General Dynamics Corp.,
663 F.2d 340, (1st Cir. 1981) 16, 17

Herb's Welding, Inc. v. Gray,
470 U.S. 414, 84 L.Ed.2d 406,
105 S.Ct. 1421 (1985) 5, 7, 12

Hullinghorst Industries, Inc. v. Carroll,
650 F.2d 750, 14 BRBS 373
(5th Cir. 1980), *cert. denied,*
454 U.S. 1163 (1982) 9, 18, 19

Newport News Shipbuilding & Dry Dock Company v. Graham,
573 F.2d 167 (4th Cir.),
cert. denied, 439 U.S. 979,
99 S.Ct. 563, 58 L.Ed.2d 649 (1978) 24

Northeast Marine Terminals Co. v. Caputo,
432 U.S. 249, 53 L.Ed.2d 320,
97 S.Ct. 2348 (1977) 6, 30

Pittman Mechanical Contractors, Inc. v. Director, OWCP,
35 F.3d 122 (1994) 25-27

Price v. Norfolk and Western Ry. Co.,
618 F.2d 1059, (4th Cir. 1980) 17, 23, 24

Ricker v. Bath Iron Works Corp.,
24 BRBS 201 (1991) 5, 18

Stewart v. Brown and Root, Inc.,
7 BRBS 356 (1978), *aff'd. sub nom.*
Brown v. Joyner, 607 F.2d 1087,
11 BRBS 86 (4th Cir. 1979),
cert. denied, 446 U.S. 981 (1980) 20-22

Voris v. Eikel,
346 U.S. 328, 98 L.Ed. 5,
74 S.Ct. 88 (1953) 31

Warren Bros. v. Nelson,
635 F.2d 552, (6th Cir. 1980) 17

Weyher/Livsey Constructor, Inc. v. Prevetire,
27 F.3d 985 (1994) 23

White v. Newport News Shipbuilding & Dry Dock Co.,
633 F.2d 1070, 12 BRBS 598
(4th Cir. 1980) 10

Statutes:

Longshore and Harbor Workers' Compensation Act,
33 U.S.C. §901 3
33 U.S.C. §902(3) 3, 5, 7

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Thomas C. Prevetire, by counsel, respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-13a) is reported at 27 F.3d 985. The decision of the Benefits Review Board (App., *infra*, 16a-23a) is unreported. The decision of the administrative law judge (App., *infra*, 24a-33a) is unreported.

JURISDICTION

The Court of Appeals entered its judgement on June 29, 1994, and denied a petition for rehearing with suggestion for rehearing *in banc* on October 26, 1994 (App., *infra*, 14a-15a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The pertinent provision of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §902) is reprinted in full at App., *infra*, 34a-35a.

STATEMENT

This case involves a question of jurisdictional coverage under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq., (herein after "Longshore Act" or "LHWCA"). The Petitioner, Thomas C. Prevetire, filed for a claim of disability benefits under the Longshore Act as a result of a work-related injury occurring on October 16, 1986. Prevetire worked as pipefitter for Weyher-Livsey Constructors, Inc. (hereinafter "Employer"). At the time of his injury, Prevetire was involved in the construction of a power plant located in the Norfolk Naval Shipyard. The Employer denied Prevetire's claim on the grounds that his work did not meet the "status" requirement set forth in Section 2(3) of the Longshore Act. 33 U.S.C. §902(3).

A hearing was held before the administrative law judge on December 4, 1989. In his *Decision and Order* dated March 28, 1990, the administrative law judge

determined that Prevetire's work did not have a "realistically significant relationship to traditional maritime activities" and that his duties as a pipe fitter were not "inherently maritime" (App., *infra*, 32a; citing *Conti v. Norfolk & Western Rwy. Co.*, 566 F.2d 890, 895 (4th Cir. 1977)). As such, the ALJ held that Prevetire had not met the status requirement of the LHWCA, and therefore Prevetire's claim for benefits were denied (App., *infra*, 33a).

The Benefits Review Board reversed the Administrative Law Judge's decision, holding that the ALJ "applied improper standards in determining whether claimant is engaged in maritime employment" (App., *infra*, 19a). Instead, the Board relied upon the "integral or essential part" test as set forth in the Supreme Court's decision in *Chesapeake & Ohio Ry. Co. v. Schwalb*, 439 U.S. 40, 45, 107 L.Ed.2d 278, 110 S.Ct. 381 (1989). Accordingly, the Board determined that Prevetire was a "maritime employee" because he was involved in the construction of a power plant

which ultimately provided steam and electricity **essential** to the operation of the shipyard (App., *infra*, 20a-21a; citing *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991)).

The Employer appealed that decision to the Court of Appeals for the Fourth Circuit. On June 29, 1994, the court of appeals reversed the decision of the Benefits Review Board, stating that the Board's "expansive view of maritime employment is inconsistent with the LHWCA and its 1972 Amendments" (App., *infra*, 8a). The court of appeals relied upon *Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 84 L.Ed.2d 406, 105 S.Ct. 1421 (1985), and concluded that Prevetire was not a "maritime employee" within the meaning of the Act. 33 U.S.C. 902(3) (App., *infra*, 9a-10a).

Prevetire petitioned the court of appeals for a rehearing with suggestion for rehearing *in banc*. In its Order dated October 26, 1994, Senior Judge Sprouse voted to grant rehearing, and Judge Murnaghan and Judge Harvey, sitting by designation, voted to deny rehearing (App., *infra*, 15a).

A member of the court requested a poll on the suggestion for rehearing *in banc*, and a majority of the judges voted to deny rehearing *in banc* (App., *infra*, 15a).[1]

REASONS FOR GRANTING THE PETITION

1. The decision of the court of appeals is in direct conflict with this Court's decision in *Schwalb*. Moreover, the decision of the court of appeals is based upon a misinterpretation of this Court's decision in *Herb's Welding*.

Under the 1972 amendments to the Longshore Act, eligibility for compensation benefits pursuant to a work-related injury depends upon the results of two tests: "status" of the employee, and "situs" of the injury. *Northeast Marine Terminals Co. v. Caputo*, 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977). The status requirement is imposed by Section 902(3) of the Longshore Act, which provides, in

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[1] Judges Wilkings, William, Michael, and Senior Judge Sprouse voted to rehear the case *in banc*. Chief Judge Ervin, Judges Russell, Widener, Murnaghan, Wilkinson, Niemeyer, Hamilton, Luttig, and Motz voted against rehearing *in banc* (App., *infra*, 15a).

part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . .

33 U.S.C. § 902(3) (1988) (App. *infra*, 34a).

As the parties in the present case do not dispute that Prevetire was injured on a maritime situs in the course and scope of his employment, the question is whether Prevetire was a "maritime employee" within the meaning of the LHWCA.

In denying Prevetire's claim for benefits, the court of appeals relied upon *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 84 L.Ed.2d 406, 105 S.Ct. 1421 (1985). In doing so, the Fourth Circuit Court of Appeals misinterpreted the Supreme Court's decision in *Herb's Welding* and erroneously applied that case to the factually distinguishable situation in the present case.

Claimant Gray in *Herb's Welding* was a maintenance-

welder who worked on an offshore platform used to search for gas and oil. In that case, the Supreme Court reasoned that neither the offshore search for oil and gas nor the platforms used in that process were "inherently maritime" for purposes of coverage under the LHWCA, and therefore, the Supreme Court concluded that claimant Gray was not entitled to compensation benefits. *Id.*, 470 U.S. at 424.

Applying *Herb's Welding* to the present case, the court of appeals wrote:

> Both Gray and Prevetire were construction workers: Gray was a welder who built and replaced pipelines, Prevetire a pipe fitter who helped build and replace a power plant. Neither man built or repaired ships. Neither man loaded or unloaded ships. . . . Gray's welding work and Prevetire's pipe fitting were both far removed from traditional LHWCA activities, such as longshoring. Neither welding nor pipe fitting is an inherently maritime task. (App., *infra*, 9a).

The court's first error in making this comparison between claimant Gray in *Herb's Welding* and Prevetire in the present case is the statement that "[n]either welding nor pipe fitting is an inherently maritime task." It is well settled

that both welding and pipefitting can be considered maritime work when performed as an integral part of the overall ship repair/construction process. For example, in *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1980), *cert. denied*, 454 U.S. 1163 (1982), the Fifth Circuit wrote, "'non-maritime' skills applied to a maritime project *are* maritime for purposes of the 'maritime employment' test of the Act." *Id.*, 650 F.2d at 756, 14 BRBS at 377 (emphasis in original).[2] The fact that the nature of an employee's duties is not altered by a maritime environment

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[2] The Fifth Circuit clarified this rationale in *Fontenot v. AWI, Inc.*, 923 F.2d 1127 (1991). The court made the following analysis:

> [W]hile wireline work can be unconnected with maritime commerce, so too can the unloading and loading, and construction activities that the Court recognizes as the focus of the maritime employment test. For example, an employee might engage in construction activities, but build an airplane instead of a ship. **Nothing intrinsic in any of these activities establishes their maritime nature, rather it is that they are undertaken with respect to a ship or vessel. When the tasks are undertaken to enable a ship to engage in maritime commerce, then the activities become "maritime employment".**

Id., 923 F.2d at 1131 (footnotes omitted).

therefore does not prevent a finding of coverage under Section 2(3). *See generally White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980). To the extent that the court's decision in the present case was based upon the conclusion that Mr. Prevetire's duties as a welder were not "inherently maritime", that finding is clearly inconsistent with well established precedent.

Furthermore, the Fourth Circuit's contrived correspondence between Gray and Prevetire is faulty simply because there is a clear distinction between an oil rig which is not an inherently maritime facility and a shipyard's power plant that provides electricity and steam to the entire shipyard which is an inherently maritime facility. In applying the rationale of *Herb's Welding* to the instant case, the court of appeals placed Prevetire's work into the same ***obviously*** non-maritime class of employment as Gray, and thus, the court's comparison between *Herb's Welding* and the present case is

mistaken.

In this regard, the petitioner fully agrees with this Court's holding in *Herb's Welding*, however, contends that the court of appeals erred in applying that decision to the present case. *Herb's Welding* stands for the proposition that when considering the "status" of employees ostensibly involved in ship loading and unloading, only those employees whose duties are found to be an integral part of the loading and unloading process will be conferred "status" under the LHWCA. The holding in *Herb's Welding,* thus, actually supports coverage in the instant claim when viewed in light of the maritime work involved--the ship repair process--clearly an activity equally maritime to ship loading and unloading. Since the construction of the ship repair facilities' power plant is undeniably integral to the overall ship repair process, "status" must be conferred on Mr. Prevetire.

Specifically, this Court held in *Herb's Welding* that the offshore oil industry in that case did not constitute a

maritime industry. *Herb's Welding*, *supra*, 470 U.S. at 421-422. In the present case, however, the Norfolk Naval Shipyard is involved in the ship repair process, clearly a maritime industry, which has not been disputed by any of the parties. Accordingly, it is clear that *Herb's Welding* does not conflict with the present case, nor should it have been applied here by the court of appeals because it does not have any controlling application. *See also Campbell v. Sonat Offshore Drilling, Inc.*, 797 F.2d 1115, 1121-1122 n.8 (5th Cir. 1992).

Indeed, this distinction was properly noted by Senior Judge Sprouse, who wrote in his Dissent:

> . . . I believe the majority's reliance on *Herb's Welding, Inc. v. Gray,* 470 U.S. 414 (1985), is misplaced. There, the decision denying coverage turned on the Court's view that neither the offshore search for oil and gas, nor the oil industry's use of offshore platforms in that process, had any relation to one of the Act's primary purposes--the protection of shipyard workers whose activities affect the loading or unloading of ships. Here, however, the furnishing of electrical power is closely related to maritime work performed in the shipyard. (App., *infra*, 12a).

Rather than *Herb's Welding*, the court of appeals should have analyzed Mr. Prevetire's "status" consistently with this Court's decision in *Chesapeake & Ohio Rwy. Co. v. Schwalb*, 493 U.S. 40, 107 L.Ed.2d 278, 110 S.Ct. 381 (1989), a decision with which the court of appeals' decision is directly at odds.

This Court in *Schwalb* applied the "integral or essential part" test in determining whether an employee has met the maritime status of the Act;

> In the course of considerable litigation, including several cases in this Court, it has been clearly decided that, aside from the specified occupations, land-based activity occurring within the §903 situs will be deemed maritime only if it is an **integral or essential part** of loading or unloading a vessel.

Schwalb, *supra*, 493 U.S. at 45 (emphasis supplied). In the present case, the majority panel noted the "integral or essential part" test as set forth in *Schwalb* (App., *infra*, 8a); but failed to properly apply it to Mr. Prevetire's employment. In failing to do so, the court of appeals closed

its eyes to the integral relationship between the power produced by the generating plant and the overall ship repair operations at the shipyard.

The electrical power plant which Mr. Prevetire was constructing was inextricably integrated into the ongoing process of the ship repair activity performed at the Norfolk Naval Shipyard. It is true that Mr. Prevetire was not a longshoreman in the traditional sense; he was not unloading a ship, nor was he loading one. His work was, however, critical to the construction of the power plant located within the shipyard. This power plant provided the power, both steam and electricity, used by the shipyard. Without Mr. Prevetire's activity, there would not be a generator to produce power. Without power, each individual department within the shipyard could not perform their duties and all operations and ship repair processes would cease. In this regard, it follows that the generator plant is <u>essential</u> to the entire shipyard operation. Accordingly, it is evident that

under *Schwalb*, Prevetire's duties would be considered "integral or essential" to the operations at the Norfolk Naval Shipyard, and therefore deemed "maritime employment."

In his Dissent, Senior Judge Sprouse reached the same conclusion:

> In my view, the construction of a power plant at the shipyard is also essential to the shipyard's maritime operations, for without electricity and steam, no shipbuilding or repair work could be performed. Prevetire's construction work on the power plant, therefore, was a link in the shipbuilding and ship repair process that was just as essential as the maintenance and repair of machinery used in that process. (App., *infra*, 11a-12a).

Rather than relying upon *Herb's Welding*, the court of appeals should have fully considered this Court's rationale in *Schwalb* to determine whether Mr. Prevetire's duties had an integral relationship to the shipyard's operations. Had the court of appeals done so, it would have reached the proper conclusion, that is the decision in *Schwalb* compels a finding of "status" under the LHWCA in this case.

2. The decision of the court of appeals creates a conflict between the Fourth Circuit and decisions of other circuits, specifically the decisions in *Graziano* and *Hullinghorst*.

The First Circuit discussed the "status" requirement in *Graziano v. General Dynamics Corp.*, 663 F.2d 340 (1st Cir. 1981). That case involved a maintenance-mason employed by General Dynamics, a corporation engaged in the building and repairing of ships. Graziano's primary duties involved the repair of masonry in shipyard buildings, but also included digging ditches, breaking up concrete, laying cement, grouting, removing asbestos from pipes, repairing boilers and manholes, and cleaning acid tanks. *Id.*, 663 F.2d at 341. There, the court concluded that the language of the 1972 Amendments was broad and suggested an expansive view of coverage, and therefore held that Graziano had met the status requirement of the Longshore Act. *Id.*, 663 F.2d

at 342. That court further noted a line of cases[3] holding that employees involved in the maintenance repair of machinery utilized in the shipbuilding, ship repair, or ship unloading process were covered under the Longshore Act. *Id.*, 663 F.2d at 342.

In finding that claimant Graziano was a "maritime employee" under the LHWCA, the First Circuit relied upon *Price v. Norfolk and Western Ry. Co.*, 618 F.2d 1059, (1980).[4] The *Graziano* court noted that the Fourth Circuit's decision in *Price* was well reasoned and fairly characterized a broad and expansive interpretation of the Act. *Id.*, 663

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[3] *Warren Bros. v. Nelson*, 635 F.2d 552, 556, (6th Cir. 1980); *Boudloche v. Howard Trucking Co., Inc.*, 632 F.2d 1346, 1347 (5th Cir. 1980), *cert. denied*, 452 U.S. 915, 101 S.Ct. 3049, 69 L.Ed.2d 418 (1981); *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1220-1221 & n.5 (5th Cir. 1980); *Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059, 1061 (4th Cir. 1980); *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167 (4th Cir.), *cert. denied*, 439 U.S. 979, 99 S.Ct. 563, 58 L.Ed.2d 649 (1978); *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178 (5th Cir.), *cert. denied*, 434 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 190 (1977); *Bradshaw v. McCarthy*, 3 BRBS 195 (1976), *petition for review denied*, 547 F.2d 1161 (3d Cir. 1977).

[4] The decision in *Price* will fully be discussed in Section 3 of this petition, *infra*.

F.2d at 342.

If an individual employed in the maintenance and repair of shipyard buildings is covered under the Longshore Act, then clearly an individual who is employed in the construction of such buildings is also covered. It cannot be contested that the power plant is essential of the overall shipyard operations because the steam and electricity produced by the power plant is critical to all ship repair activities in the shipyard.[5] Therefore, it follows that the construction and maintenance of that power plant is equally critical to the overall operations at Norfolk Naval Shipyard.

In addition, the Fifth Circuit addressed the importance of a broad view of jurisdictional coverage in *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). The

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[5] *See, e.g., Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991), where the Board held that a boiler is an essential facility in shipyard operations, for shipbuilding and ship repair work could not be performed without power.

claimant in *Hullinghorst* worked for a sub-contractor as a scaffolding carpenter at a port facility. The only work performed by the Hullinghorst employees was to erect scaffolds wherever needed in the port facility. Although the claimant in *Hullinghorst* did not participate directly in the loading, unloading, building, repairing or breaking of any vessel, the Fifth Circuit held that his job constructing scaffolds for port purposes was maritime employment. *Id.*, 650 F.2d at 755.

If the construction of scaffolds to be used in a shipyard is deemed maritime employment, then clearly the construction of a power plant which runs the entire shipyard must be deemed maritime employment. It follows that Mr. Prevetire's work as a welder in constructing the power plant at the Norfolk Naval Shipyard would be "maritime employment" under the Fifth Circuit's standard in *Hullinghorst*. To hold otherwise creates a clear conflict.

The decision of the court of appeals in the present

case is inconsistent with the decisions from both the First Circuit and Fifth Circuit, and creates a conflict which must be clarified by this Court.

3. The decision of the court of appeals is in conflict with its own decisions in *Stewart/Joyner*, *Price*, and *Simonds*.

The Fourth Circuit clarified the status requirement in *Stewart v. Brown and Root, Inc.*, 7 BRBS 356 (1978), *aff'd. sub nom. Brown v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980). In that case, it was held that:

> For future application of the "status" test, at least those persons directly involved in the **construction**, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships) will be deemed "harborworkers" within the meaning of Section 2(3) of the Act.
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> 7 BRBS at 365 (emphasis supplied).

In *Stewart/Joyner*, Newport News Shipbuilding & Dry Dock Company contracted Brown & Root, Inc., an

independent contractor, to construct an addition to the shipyard. The project included the construction of an administration building, a fabrication shop, a permanent dry dock, and other related areas such as craneways and assembly areas. The claimants in that case, Brown & Root employees, were involved in the construction of the new part of the shipyard and the Fourth Circuit concluded that their work met the "status" requirement of the Act. *Id.*, 607 F.2d at 1090. The decision in *Stewart/Joyner* compels a conclusion that since Prevetire was involved in the construction of a shipyard facility critical to the entire shipyard repair process, specifically the power plant, he should have "status" within the meaning of Section 2(3) of the LHWCA.

It is noteworthy that the court of appeals did not even address its prior decision in *Stewart/Joyner* in reaching its

conclusion in the present case.[6] Perhaps the reason for the court of appeals failing to consider its own decision in *Stewart/Joyner* is the fact that the decision in the present case is irreconcilably in conflict with *Stewart/Joyner*.

The Fourth Circuit specifically held in *Stewart/Joyner* that "both Stewart and Joyner satisfy the status test because they were engaged in maritime employment while they worked to **construct** the dry dock". 607 F.2d. at 1090 (emphasis supplied). In that case, claimant Stewart worked in numerous areas throughout the construction project, and was injured while carrying out his duties as a painter-sandblaster. Claimant Joyner, a general excavation foreman, was killed by a tractor while supervising the loading of sand

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[6] The clear conflict between the *Stewart/Joyner* decision and the decision in the present case was repeatedly pointed out by claimant's counsel, but was simply ignored by the court. In Respondent's Brief filed with the Court of Appeals for the Fourth Circuit on October 4, 1993, the *Stuart/Joyner* decision was offered to the court for evaluation (Respondent Prevetire's Brief at 14). That decision was again offered to the Fourth Circuit for evaluation in Prevetire's "Petition for Rehearing" filed on July 13, 1994 (Brief in Support of Petition for Rehearing with Suggestion for Rehearing *In Banc* at 6-7).

at a reclaiming pit where it had settled after being pumped ashore. The sand was used to grade the expanded part of the shipyard and to backfill the concrete walls of the incomplete dry dock. *Id.*, 607 F.2d at 1089.

If the court of appeals found that an employee involved in the construction of an entire part of a shipyard is covered under the LHWCA, as in *Stewart/Joyner*, then how could that same court rule that an employee who constructs a power plant, which runs the entire shipyard, does not have "status", as in the present case. Yet the court did, creating a clear conflict which must be resolved. The prior decision of *Stewart/Joyner* was simply ignored by the court of appeals in the present case. A petition for a writ of certiorari should be granted in order to resolve the current conflict between the *Prevetire* decision[7] and the *Stewart/Joyner* decision.

The Fourth Circuit's decision in *Price v. Norfolk and*

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[7] *Weyher/Livsey Constructor, Inc. v. Prevetire*, 27 F.3d 985 (1994)

Western Ry. Co., 618 F.2d 1059 (4th Cir. 1980), also conflicts with the court's opinion in *Prevetire*. In *Price*, the claimant was a railroad employee injured while painting a support tower for a gallery belt system used in loading and unloading grain. In holding that Price had met the status requirement of the Act, the Fourth Circuit held:

> We can discern no significant distinction between the repair of machinery essential to the movement of maritime cargo and the painting of a structure essential to the loading and unloading of the same. Nor can we discern any significant distinction between oiling a machine used in building ships, as was the claimant in *Graham*[8], and painting a structure used in loading and unloading ships.
>
> *Price*, 618 F.2d at 1061-1062.

The court's rationale in *Price* is consistent with the Supreme Court's decision in *Schwalb*, *supra*, which held that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are

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[8] *Newport News Shipbuilding & Dry Dock Company v. Graham*, 573 F.2d 167 (4th Cir.), *cert. denied*, 439 U.S. 979, 99 S.Ct. 563, 58 L.Ed.2d 649 (1978).

covered under the Longshore Act.

In the present case, the power plant involved is just as essential to ongoing construction and repair of ships as the machinery involved in *Schwalb* and *Price* was to the loading and unloading process. There is no legal basis for distinguishing between ship repair/construction and ship loading/unloading for purposes of determining "status" under the Longshore Act.

In addition to the conflicts between the present case and the decisions in *Stewart/Joyner* and *Price*, the Fourth Circuit's recent decision in *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122 (1994), is also at odds. In that case, claimant Simonds was injured while working as a pipe welder for Pittman Mechanical Contractors, Inc. The injury occurred on Pier 12 at the Norfolk Naval Operations Base. Pittman Mechanical, an independent contractor, had contracted with the Navy to construct and install pipelines into the pier. The pipelines were used to load fuel, steam

and water onto the vessels when they were docked at the pier. *Id.*, 35 F.3d at 124.

In determining whether Simonds was a covered employee under the LHWCA, the Fourth Circuit used the "integral or essential part" test that was established in *Schwalb*. *Id.*, 35 F.3d at 125-126. Using this standard, the court of appeals determined that Simonds' duties as a pipe welder in constructing and installing pipelines into the pier were integral to the overall process of loading and unloading a vessel. Accordingly, the court concluded that Simonds was engaged in maritime employment. *Id.*, 35 F.3d at 126.

Based upon the Fourth Circuit's opinion in the present case, Pittman Mechanical argued that Simonds was not a "maritime employee" within the meaning of Section 2(3). In response to Pittman's contentions, the court of appeals wrote:

> It is true that this court has ruled that a pipe fitter engaged in the construction of a power plant at a naval shipyard, intended ultimately to produce the

> electricity necessary for the operation of equipment needed for ship-building and ship-repair operations, was not engaged in maritime employment. *Prevetire*, No. 93-1819, 1994 WL 284595, at *3. That tenuated connection with maritime status precluded any finding that the claimant in that case was involved in the "repair[] or [maintenance of] equipment used in the loading or unloading process." *Id.* In the instant case, Simonds was injured while installing and repairing pipelines that transported steam, water, and fuel--supplies essential to the operation of the vessel--from land-based storage facilities over a pier and onto the docked ships. The necessity of these items is demonstrated by the fact that Pier 12 could not be used for docking purposes while the pipelines were out of commission. The transported steam and water were necessary for the ships' proper operation, while the fuel was required for the operation of the aircraft contained on board the carriers. Absent other means of transport, the pipelines serviced by Simonds were the only available method to load the supplies essential to the ships' operation. Hence, Simonds was actually engaged in the installation and repair of equipment necessary for the loading process and, thereby, in maritime employment.
>
> *Id.*, 35 F.3d at 126.

Under the court's rationale in *Simonds*, Mr. Prevetire's duties as a welder must equally be deemed "maritime employment." Similar to the new pipelines installed by Simonds, that would provide steam, water and

fuel to carriers docked at the pier, the power plant constructed by Mr. Prevetire was essential to the overall ship repair operations at the shipyard. As the court noted in *Simonds*, "[a]bsent other means of transport, the pipelines serviced by Simonds were the only available method to load the supplies essential to the ships' operation." *Id.*, 35 F.3d at 126. Likewise, absent other means of operating the Norfolk Naval Shipyard, the power plant constructed by Prevetire was the only available method of power in the entire shipyard, and therefore essential to the shipyard's operations.

Contrary to court's attempt to distinguish the *Simonds* decision from its previous conclusion reached in *Prevetire*, the fact is that the present case on appeal before this Honorable Court is in direct conflict with *Simonds*. Given the rationale proposed by the court of appeals in *Simonds*, one is left to question wherein lies the distinction between *Simonds* and *Prevetire*.

If the court in *Simonds* found a distinction between

employees involved in the loading/unloading of ships and those involved in the ship repair/shipbuilding process, there is absolutely no basis for such a distinction. Both ship loading/unloading and ship repair/shipbuilding are covered activities within Section 2(3) of the LHWCA. Thus, the fact that Mr. Simonds was injured while constructing a device used to load ships does not distinguish him from Mr. Prevetire who was involved in the construction of a facility essential to the ship repairing process.

If, on the other hand, the court in *Simonds* found a distinction between the characterization of the work being performed, whether construction or maintenance/repair, again this distinction is not supported by the LHWCA, the well established case law interpreting the Act,[9] nor by common sense. In fact, both employees were involved in construction

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[9] Indeed, the Fifth Circuit held in *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1220 (1980), that the initial construction of a pier cannot be distinguished from pier repair work for purposes of determining the maritime nature of employment.

projects: Prevetire in constructing a power plant; Simonds in constructing and installing new pipelines for Pier 12. Yet, Simonds was deemed a "maritime employee" and Prevetire was not.

The fact is there is no valid distinction between the situation presented in *Simonds* and that of the instant case. Moreover, if such a distinction was to be drawn, it would be in direct conflict with Fourth Circuit's prior opinion in *Stewart/Joyner*. A clear conflict is created by these two inconsistent decisions and, accordingly, review by this Court is warranted.

If an employee injured while constructing the facilities integral to the overall ship repair process is not covered under the LHWCA, where an employee injured while maintaining those same facilities is covered, then the type of incongruous results sought to be avoided by this Court in *Northeast Marine Terminals Co. v. Caputo*, 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977), will ensue. This

Court held in *Caputo* that the definition of a "maritime employee" pursuant to Section 2(3) should be liberally construed in favor of the injured employee. *Id.*, 432 U.S. at 268. This Court also emphasized that both the Longshore Act and the 1972 Amendments were remedial in intent and should be read broadly and "in a way which avoids harsh and incongruous results" *Id.*, 432 U.S. at 268, citing *Voris v. Eikel*, 346 U.S. 328, 333, 98 L.Ed. 5, 74 S.Ct. 88 (1953). The decision by the court of appeals in the present case creates a direct conflict with its subsequent decision in *Simonds*. This conflict within the Fourth Circuit is not reconcilable and in order to resolve future "incongruous" results, this petition for a writ of certiorari should be granted.

CONCLUSION

In conclusion, the decision of the court of appeals is in direct conflict with this Court's decision in *Schwalb*, in conflict with the decision of other circuit courts of appeals, and even in conflict with prior and subsequent decisions of the Fourth Circuit. For these reasons, this petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-1819

WEYHER/LIVSEY CONSTRUCTORS, INC.;
WAUSAU INSURANCE COMPANIES,

PETITIONERS,

v.

THOMAS C. PREVETIRE;
DIRECTOR, O.W.C.P.,
UNITED STATES DEPARTMENT OF LABOR,

RESPONDENTS.

On Petition for Review of an Order
of the Benefits Review Board
(90-1181)

Argued: April 11, 1994
Decided: June 29, 1994

Before MURNAGHAN, Circuit Judge, SPROUSE, Senior Circuit Judge, and HARVEY, Senior United States District Judge for the District of Maryland, sitting by designation.

OPINION

MURNAGHAN, Circuit Judge:

Thomas C. Prevetire was injured on the job and filed a claim for disability benefits under the Longshore and Harbor Workers' Compensation Act ("the LHWCA" or "the Act"), 44 Stat. (part 2) 1424, as amended, 33 U.S.C. §§ 901-950. An administrative law judge denied his claim, but the Benefits Review Board of the United States Department of Labor reversed. The employer now petitions for review of the Board's decision and order.

I

Respondent Prevetire was employed as a pipe fitter by petitioner, Weyher-Livsey Constructors, Inc.,[1] when it was building a power plant on the premises of the Norfolk Naval Shipyard in Portsmouth, Virginia. As the project was originally conceived, all of the steam and most of the electricity produced at the plant would be used at the shipyard for its day-to-day operations, and the surplus electrical power produced at the plant would be sold commercially to consumers outside the shipyard.[2]

While working at the construction site, Prevetire suffered an injury that resulted in a permanent partial disability to the ring finger of his left hand. He notified Weyher-Livsey of his injury and filed a claim for disability

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[1] The other petitioner, Wausau Insurance Co., is the workers' compensation carrier for Weyher-Livsey.

[2] For at least the first year after the plant was built, however, the shipyard used all the electricity and steam produced by the plant.

compensation under the LHWCA. Weyher-Livsey agreed to compensate Prevetire for his disability under the Virginia state workers' compensation act but refused to pay the higher disability compensation benefits that the LHWCA would require.[3]

The administrative law judge (ALJ) issued a decision denying Prevetire's claim on the ground that he was not a "maritime employee" covered by the LHWCA. He found that the skills Prevetire used in building the power plant were not distinctly maritime, and the purpose of his employment lacked "a 'realistically significant relationship to' traditional maritime activity involving navigation and commerce on navigable waters."

Prevetire appealed to the Benefits Review Board. The Board reversed the ALJ's decision on the grounds that its reliance on the "significant relationship" test was invalid in light of the Supreme Court's decision in *Chesapeake & Ohio Railway Co. v. Schwalb,* 493 U.S. 40 (1989), and that its reliance on the absence of a maritime character of the "skills used" was also erroneous because nonmaritime skills applied to a maritime purpose constitute maritime employment. The Board also held that building structures and machinery for shipyard work is an "essential element" of building and repairing ships, and that the construction of the power plant was essential to the shipyard's operations, including shipbuilding and ship repair work, and thus constituted "maritime employment" under the Act. Weyher-Livsey timely petitioned for review of the Board's decision.

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[3] There was no dispute as to *medical* benefits: Weyher-Livsey, as the employer, provided all medical benefits to which Prevetire would have been entitled under the LHWCA, 33 U.S.C. § 907.

II

A

The Supreme court has stated that the Benefits Review Board is not a policymaking agency and therefore its interpretations of the LHWCA are entitled to no special deference from the Courts of Appeals. *See Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs,* 449 U.S. 268, 278 n.18 (1980).

In the present case, the Solicitor of Labor has filed a brief on behalf of the Director of the Office of Workers' Compensation Programs of the Department of Labor (the "Director"), who, as one of the respondents here, supports Prevetire's broad interpretation of the Act. We do afford deference to the Director's interpretation of the LHWCA because he has policymaking authority with regard to the Act. *See Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.,* 8 F.3d 175, 179 (4th Cir. 1993) ("[W]e should respect a reasonable interpretation of the LHWCA by the Director.... Absent clear congressional intent as to the proper construction of the LHWCA, we must give deference to the Director's reasonable and permissible interpretation."); *Zapata Haynie Corp. v. Barnard,* 933 F.2d 256, 258-59 (4th Cir. 1991) ("[T]his court defers to [the Director's] interpretation [of the LHWCA] unless it is unreasonable or contrary to Congressional intent."); *Newport News Shipbuilding & Dry Dock Co. v. Howard,* 904 F.2d 206, 208-09 (4th Cir. 1990); *cf Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984).

As we explain below, the Director's construction of

the LHWCA in the present case is both unreasonable and contrary to Congress' clear intent, as expressed in the Act's text and structure. In such a case, our duty is to enforce the will of Congress, notwithstanding the Director's interpretation.

B

The LHWCA creates a comprehensive federal scheme to compensate a broad range of land-based maritime workers who are injured or killed on the job. *See Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2592 (1992); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347 (1991). Before 1972 the LHWCA covered only workers injured on the actual "navigable waters of the United States (including any dry dock)." 44 Stat. (part 2) 1426. The 1972 Amendments to the LHWCA extended the Act's coverage by replacing what had been a rather restrictive "situs" test of eligibility for compensation with a broader "situs" test that allows compensation for any "employee" whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a).

"[W]ith the definition of 'navigable waters' expanded by the 1972 Amendments to include such a large geographical area, it became necessary to describe affirmatively the class of workers Congress desired to compensate." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264 (1977); *accord Director, Office of Workers' Compensation Programs v. Perini North River Assocs.*, 459 U.S. 297, 317 (1983). Specifically, Congress added a "status" test restricting the Act's coverage to "person[s]

engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. § 902(3). Clauses (A) through (H) of § 902(3) enumerate several categories of persons who are expressly *not* covered "employees," such as clerical workers and persons employed by waterfront restaurants, retail stores, and museums. *Id* § 902(3)(A)-(H).[4] To be eligible for compensation, a person

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[4] Section 902(3) provides, in full:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include --
>
> > (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
> >
> > (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
> >
> > (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
> >
> > (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of a [maritime] employer . . . , and (iii) are not engaged in work normally performed by employees of that employer under [the Act];
> >
> > (E) aquaculture workers;
> >
> > (F) individuals employed to build, repair, or dismantle

must be an employee as defined by § 902(3) who sustains an injury on the situs defined by § 903(a). *See Schwalb,* 493 U.S. at 45. The requirements of §§ 902(3) and 903(a) are liberally construed to favor coverage under the LHWCA. *See Caputo,* 432 U.S. at 268.

In the present case, there is no dispute that the situs test is satisfied. The sole disputed issue is whether Prevetire, a shipyard power-plant construction worker, was a "person engaged in maritime employment" within the meaning of § 902(3). Although the statute expressly provides a few examples of a "person engaged in maritime employment" -- a longshoreman, a ship repairman, a shipbuilder, and so forth -- it sets forth no general definition of "maritime employment."

The Supreme Court has repeatedly held that, aside from the occupations specifically named in § 902(3), "land-based activity occurring within the § 903 situs will be deemed maritime *only if it is an integral or essential part of loading or unloading a vessel." Schwalb,* 493 U.S. at 45-46 (emphasis added) (citing three Supreme Court precedents). In

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any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

Indisputably, Prevetire fell within none of the exclusions specified in clauses (A) through (H) of § 902(3), so it remains necessary to decide whether he was "engaged in maritime employment."

Schwalb, the Court held "that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act" because they "are engaged in activity that is an integral part of and essential to those overall processes." *Id.* at 47.

C

The respondents in the present case (Prevetire and the Director) invite us to extend *Schwalb* by holding that a pipe fitter who was employed in only the *construction* of a power plant (as distinguished from its later operation or maintenance) was engaged in activity that was an integral or essential part of loading or unloading a vessel and hence was "engaged in maritime employment" *simply because the power plant being built would eventually provide steam and electricity to shipbuilding and ship-repair operations.* Because such an expansive view of maritime employment is inconsistent with the LHWCA and its 1972 Amendments, as interpreted in a long line of Supreme Court decisions, we decline respondents' invitation, grant Weyher-Livsey's petition, and reverse the Benefits Review Board's decision.

Justice White, writing for the Court in *Herb's Welding, Inc. v. Gray,* 470 U.S. 414 (1985), explained that the 1972 Amendments'

> expansion of the definition of navigable waters to include rather large shoreside areas necessitated an affirmative description of the particular employees working in those areas who would be covered. This was the function of the maritime employment requirement. But Congress did not seek to cover all those who breathe salt air.

Id. at 423. Justice White's opinion for the Court went on to hold that Robert Gray, the LHWCA claimant, was not "engaged in maritime employment," within the meaning of § 902(3). *Herb's Welding*, 470 U.S. at 427.[5]

Prevetire's claim is significantly weaker than Gray's claim, which the Court rejected. Both Gray and Prevetire were construction workers: Gray was a welder who built and replaced pipelines, Prevetire a pipe fitter who helped build and replace a power plant. Neither man built or repaired ships. Neither man loaded or unloaded ships. Neither man repaired or maintained equipment used in the loading or unloading process. Gray's welding work and Prevetire's pipe fitting were both far removed from traditional LHWCA activities, such as longshoring. Neither welding nor pipe fitting is an inherently maritime task. Both jobs are also performed on land, and their nature is not significantly altered by the marine environment. *Compare Herb's Welding,* 470 U.S. at 416, 425.

Gray, however, worked on a fixed *offshore* oil-drilling platform. He commuted to and from his workplace by boat and even loaded and unloaded his welding gear onto a boat. He regularly traveled back and forth over water among the rigs in the oil field. And he frequently faced the notorious maritime hazards associated with offshore rigs. *See id.* at 428-50 (Marshall, J., dissenting). In short, Gray did "far more than just 'breathe salt air.'" *Id.* at 449 (quoting the majority opinion, 470 U.S. at 423). Yet Gray was held not qualified for LHWCA benefits.

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[5] In *Herb's Welding*, as in the present case, the Director participated as a respondent and argued for a broad interpretation of § 902(3).

The maritime activities of Prevetire, on the other hand, barely extended beyond "breathing salt air." Indeed, the only connection between his occupation and maritime activity was the one highlighted by the respondents: power from the plant that Prevetire helped to build would eventually be used by the shipyard. Obviously, if the plant had been built just outside the shipyard's boundary rather than just inside it (or if the electricity generated by the plant had been consumed outside the shipyard), Prevetire's job would not have changed one iota.[6]

The nature of a particular job is, of course, defined in part by its location, *see Herb's Welding,* 470 U.S. at 426; but to classify Prevetire's employment as maritime, merely because the power plant that he was helping to construct would lie on the seaward side of the shipyard's boundary, would blur together the "situs" and "status" requirements which Congress intended to make distinct. Indeed, it is difficult to imagine how any employee working full-time at the Norfolk Naval Shipyard could be deemed *non*-maritime if Prevetire, the shipyard power-plant builder, were classified as a maritime employee. Thus, the respondents' suggested construction of the LHWCA would effectively read the "status" requirement out of the Act. *Cf id.; Humphries v. Director, Office of Workers' Compensation Programs,* 834 F.2d 372, 375 (4th Cir. 1987) ("Were we to read the ... requirement so broadly as to embrace this claim, ... we would come perilously close to eliminating it entirely."), *cert. denied,* 485 U.S. 1028 (1988). Because Congress did

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[6] Respondents' argument is further weakened by the fact that the power plant was not even dedicated to shipyard purposes: it was also designed for produce surplus electricity that could be sold to Virginia Power and used commercially by consumers throughout southeastern Virginia.

not intend to extend LHWCA coverage to every employee who works at a shipyard regardless of whether the work is maritime employment, Prevetire was not covered, for we hold that he was not "engaged in maritime employment" within the meaning of the Act, 33 U.S.C. § 902(3).

III

We grant the employer's petition for review, set aside the decision and order of the Benefits Review Board, and deny Prevetire's claim for disability benefits under the LHWCA. His workers' compensation rights under Virginia law will not be adversely affected.

REVERSED

SPROUSE, Senior Circuit Judge, dissenting:

I respectfully dissent. I agree with the majority that the sole dispute is whether Prevetire was a "person engaged in maritime employment" within the meaning of 33 U.S.C. § 902(3). In my view, however, a proper reading of *Chesapeake & Ohio R. Co. v. Schwalb,* 493 U.S. 40 (1989), requires a holding that Prevetire was engaged in maritime work.

As the majority points out, the *Schwalb* Court, in discussing employees who maintained and repaired equipment essential to the loading or unloading process, held that such employees are covered by the Act because they "are engaged in activity that is an integral part of and essential to those overall processes." *Schwalb,* 493 U.S. at 47. In my view, the construction of a power plant at the shipyard is also essential to the shipyard's maritime operations, for without electricity and steam, no shipbuilding or repair work could

be performed. Prevetire's construction work on the power plant, therefore, was a link in the shipbuilding and ship repair process that was just as essential as the maintenance and repair of machinery used in that process. For this reason, I believe the majority's reliance on *Herb's Welding, Inc. v. Gray,* 470 U.S. 414 (1985), is misplaced. There, the decision denying coverage turned on the Court's view that neither the offshore search for oil and gas, nor the oil industry's use of offshore platforms in that process, had any relation to one of the Act's primary purposes--the protection of shipyard workers whose activities affect the loading or unloading of ships. Here, however, the furnishing of electrical power is closely related to maritime work performed in the shipyard.

My colleagues recognize, as they must, that §902(3)'s definition of maritime employees is to be liberally construed. *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 248,268 (1977). The rule may very well be one which is often employed by judicial writers, perhaps including the present dissenter, when it matches their already matured decisions. Nonetheless, I believe that the issue of coverage *vel non* in this case is at least a close issue where the liberality rule would tilt the balance in favor of coverage.

In a similar vein, contrary to the majority, I would defer to the legal position of the Director, maintained since at least 1977, that construction work of this type is covered maritime employment. *See* LHWCA Program Memorandum No. 58, United States Dept of Labor (Aug. 10, 1977). Congress has not spoken directly on the issue we consider, and one must wonder why, if the textual structure of the Act is so clear, the Supreme Court needed to go to such lengths in *Schwalb* and *Gray* to interpret Congress' intent regarding whether employees in divergent circumstances are maritime

employees.

In my view, the Supreme Court's decision in *Schwalb* is broad enough to support the Director's view. Furthermore, there have been divergent results in decisions of the circuit courts of appeals on parallel issues. These factors along with the congressional silence on the meaning of § 902(3) as it relates to construction work on shipyard facilities make it difficult for me to accept that the Director's position is unreasonable.

APPENDIX B

FILED: October 26, 1994

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-1819
(90-1181)

WEYHER/LIVSEY CONSTRUCTORS, INCORPORATED; WAUSAU INSURANCE COMPANIES,

Petitioners,

versus

THOMAS C. PREVETIRE; DIRECTOR OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ORDER

Respondents have each filed a petition for rehearing with suggestion for rehearing in banc and petitioners filed an

answer to the petitions.

Senior Judge Sprouse voted to grant rehearing. Judge Murnaghan and Judge Harvey, Senior United States District Judge, sitting by designation, voted to deny.

A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Wilkins, Williams, Michael and Senior Judge Sprouse voted to rehear the case in banc. Chief Judge Ervin, Judges Russell, Widener, Hall, Murnaghan, Wilkinson, Niemeyer, Hamilton, Luttig and Motz voted against rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Murnaghan for the Court.

For the Court

/s/ Bert M. Montague
Clerk

APPENDIX C

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

BRB No. 90-1181

THOMAS C. PREVETIRE,
Claimant-Petitioner,

v.

WEYHER/LIVSEY CONSTRUCTORS, INC.,

and

WAUSAU INSURANCE COMPANY,

Employer/Carrier-Respondents

DECISION AND ORDER

DATED ISSUED: May 12, 1993

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER, and McGRANERY, Administrative Appeals Judges.

STAGE, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (89-LHC-1851) of Administrative Law Judge Michael P. Lesniak denying benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Employer is in the business of constructing small power plants, and it was the general contractor on a project to build a power plant at the Norfolk Naval Shipyard from 1984-1988 as a replacement for the old oil-burning plant. The power plant is a co-generation plant,[1] producing both electricity and steam for the shipyard. The waste used as fuel for the plant is "produced" at a solid waste facility run by a state agency across the street from and outside the boundaries of the shipyard. It was intended that two-thirds of the electricity and all of the steam produced would be used by the shipyard, and that the remaining one-third of the electricity would be sold to Virginia Power. As of November 1989, however, the shipyard was using all the electricity and steam produced by the plant.

The parties stipulated, *inter alia,* that claimant sustained an injury in the course of his employment on October 16, 1986, resulting in a 22 percent permanent

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[1] A co-generation plant uses more than one type of fuel. This particular plant uses refuse-derived fuel as its primary source, and oil and coal are its back-up fuels.

impairment of the left ring finger, and that claimant has received compensation under the Virginia workers' compensation statute. The parties further stipulated that at the time of injury claimant was employed as a pipefitter in the construction of the power plant on the grounds of the Norfolk Naval Shipyard. The only issues presented for the administrative law judge's resolution were whether claimant's employment satisfies the status and situs requirements of the Act. 33 U.S.C. §§902(3), 903(a) (1988). The administrative law judge concluded that the situs test was met, but that the status test was not. The administrative law judge found that claimant's job was not inherently maritime as it involved tasks identical to those performed by employer's pipefitters welding on "non-maritime" power plant projects. The administrative law judge further stated that claimant's employment does not have a realistically significant relationship to traditional maritime activities involving navigation and commerce on navigable waters. Thus, the administrative law judge denied benefits under the Act.

On appeal, claimant contends that the administrative law judge erred in concluding that the status test is not met. Claimant contends that the construction of a facility for use at the shipyard is analogous to the maintenance and repair of shipyard buildings, which is covered employment, and that the administrative law judge erred in focusing on whether claimant's trade is inherently maritime as opposed to whether the structure being constructed has a maritime purpose. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

Section 2(3) of the Act states:

> The term "employee" means any person engaged in maritime employment, including

> any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker....

33 U.S.C. §902(3) (1988). We hold that the administrative law judge applied improper standards in determining whether claimant is engaged in maritime employment, and we reverse his finding that claimant is not covered under the Act.

Initially, the administrative law judge's reliance on the 'realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters" test is misplaced in light of the decision of the United States Supreme Court in *Chesapeake & Ohio Ry. Co. v. Schwalb,* ___U.S.___ 110 S.Ct. 381, 23 BRBS 96(CRT) (1989). In *Schwalb*, the claimant was engaged in maintenance and janitorial work, including the cleaning of conveyors used in the loading process. The court stated that the proper focus is on whether the activity is an "essential element" of loading or unloading, not whether it is a "traditional maritime activity," and that the claimant's work was essential to this process. *Id.; see also Atlantic Container Service, Inc. v. Coleman,* 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990); *Coloma v. Director, OWCP,* 897 F.2d 394, 23 BRBS 136 (CRT)(9th Cir. 1990). Similarly, in finding coverage for a shipyard maintenance worker, the United States Court of Appeals for the First Circuit stated that "[t]he maintenance of the structures housing shipyard machinery and in which shipbuilding operations are carried on is no less essential to shipbuilding than is the repair of the machinery itself." *Graziano v. General Dynamics Corp.,* 663 F.2d 340, 342-343, 14 BRBS 52, 56 (lst Cir. 1981). *See also Price v. Norfolk & Western Ry. Co.,* 618 F.2d 1059 (4th Cir. 1980); *Newport News Shipbuilding & Dry Dock Co. v. Graham,* 573

F.2d 167, 8 BRBS 241 (4th Cir. 1979), *cert. denied,* 439 U.S. 979 (1978); *Hawkins v. Reid Associates*, 26 BRBS 8 (1992). Thus, the proper inquiry in this case is whether claimant's employment is essential to the shipbuilding operation.

Moreover, whether claimant's pipefitting duties are "inherently maritime" is irrelevant if the purpose of the work being performed is related to shipbuilding, In *Hullinghorst Industries, Inc. v. Carroll,* 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982), the United States Court of Appeals for the Fifth Circuit deemed it "immaterial" that the skills used by the employee are essentially non-maritime in character if the purpose of the work is maritime. The court stated: "'non-maritime' skills applied to a maritime project are maritime for purposes of the 'maritime employment' test of the Act."[2] *Id.*, 650 F.2d at 756, 14 BRBS at 377 (emphasis in original). The fact that the nature of claimant's duties is not altered by a maritime environment therefore does not prevent a finding of coverage under Section 2(3). *See generally White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980); *Jackson v. Atlantic Container Corp.*, 15 BRBS 473 (1989).

Applying this law to the facts in the instant case, we hold that claimant's employment is covered under Section 2(3) of the Act. The construction of a power plant at the shipyard is essential to the shipyard's operation, for without electricity and steam no shipbuilding and repair work can be

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[2] In *Hullinghorst*, the claimant worked for a sub-contractor at a port facility as a scaffolding carpenter. He constructed scaffolding for whatever purpose the port needed but he did not participate directly in the loading, unloading, building, repair or breaking of any vessel.

performed. *See Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991). In *Hawkins*, 26 BRBS at 8, the Board affirmed a finding of coverage for a claimant engaged in the removal of old and the installation of new underground utility lines at the same shipyard as in the instant case. As in the instant case, the claimant in *Hawkins* was not an employee of the shipyard, but was employed in construction work on a subcontracts.[3] The Board stated that claimant's work was a link in the shipbuilding process, citing *Graziano*, 663 F.2d at 340, 14 BRBS at 52. Herein, claimant's construction work on a power plant also is a link in the shipbuilding and ship repair process that is just as essential as the maintenance and repair of the machinery used in the shipbuilding process. *Graziano*, 663 F.2d at 342-343, 14 BRBS at 56. It is not material to the outcome of this case that the shipbuilding and repair process would not have stopped without the construction of a new power plant. *See Price*, 618 F.2d at 1062 n.4. It is sufficient that the purpose of the new plant is maritime in nature, *i.e.*, to supply electricity and steam to the shipyard for its operations. Thus, we reverse the administrative law judge's finding that claimant's employment does not satisfy the status test of Section 2(3). Inasmuch as the parties stipulated that claimant has a 22 percent impairment of the left ring finger, we, hold that claimant is entitled to benefits under Section 8(c)(10), (19) of the Act, 33 U.S.C. §908(c)(10), (19). Per the parties' stipulation, employer is entitled to a credit for payments made under the state act pursuant to Section 3(e) of the Act, 33 U.S.C. §903(e) (1988).

Accordingly, the administrative law judge's Decision

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[3] In *Hawkins*, 26 BRBS at 8, the claimant was a heavy equipment operator on a subcontract to remove and install utility lines underground and in a nuclear submarine repair facility under construction.

and Order denying benefits is reversed, and claimant is entitled to benefits as stated herein.

SO ORDERED.

\s\ Betty J. Stage
BETTY J. STAGE,
Chief Administrative Appeals Judge

I concur:

\s\ Regina C. McGranery
REGINA C. McGRANERY,
Administrative Appeals Judge

DOLDER, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to reverse the administrative law judge's finding that claimant's employment did not satisfy the status test of Section 2(3) of the Act, 33 U.S.C. §902(3)(1988). I agree that the administrative law judge applied the wrong law in determining whether the status test is met. Specifically, he erred in relying on the fact that claimant's work was not "inherently maritime." *See Hullinghorst Industries Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir, 1981), *cert. denied*, 454 U.S. 1163 (1982); *see generally Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985). Furthermore, the administrative law judge did not determine if claimant's work is "essential" to the shipbuilding and repair operation carried on at the shipyard. *See generally Chesapeake & Ohio Ry. Co. v. Schwalb*, ___U.S.___, 110 S.Ct. 381, 23 BRBS 96(CRT) (1989); *Hayes v. CSX Transportation, Inc.*, 985 F.2d 137 (4th Cir. 1993).

Moreover, the administrative law judge did not consider whether the cases dealing with the repair of shipyard buildings are applicable to the facts of this case. *See, e.g., Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (lst Cir. 1981). Given these errors and omissions on the part of the administrative law judge, I would vacate the administrative law judge's finding that claimant's employment did not satisfy the status test, and remand the case for the administrative law judge to apply the facts of this case to the appropriate law.

\s\ Nancy S. Dolder
NANCY S. DOLDER,
Administrative Appeals Judge

APPENDIX D

[SEAL]

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 201 -- 55 West Queens Way
Hampton, Virginia 23669
804-722-0571

CASE NO.: 89-LHC-1851
OWCP NO.: 5-67904

In the Matter of

THOMAS C. PREVETIRE,
Claimant,

v.

WEYHER/LIVSEY CONSTRUCTORS, INC.,
Employer,

and

WAUSAU INSURANCE COMPANY,
Carrier.

Appearances:
Robert E. Walsh, Esq.
For the Claimant
Daniel R. Lahne, Esq.
For the Employer
Before: MICHAEL P. LESNIAK
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for disability compensation filed by Thomas C. Prevetire pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. Section 901 et seq.

A formal hearing was held in Hampton, Virginia on December 4, 1989, at which all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations,

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.[1]

Stipulations

1. An employer/employee relationship existed at all relevant times.

2. The Claimant sustained an injury arising out of and in the course of his employment on October 16, 1986.

3. Claimant gave timely notice of the injury to the Employer.

---

[1] The following citations to the record are used herein:

EX - Employer's Exhibit
TR - Transcript of the Hearing

Findings refer to the number findings in this decision.

4. Claimant filed a timely claim for compensation under the Longshore and Harbor Workers' Compensation Act.

5. Medical benefits have been provided in accordance with Section 7 of the Act.

6. The Employer/Insurer filed a timely notice of controversion.

7. The Claimant was a pipe fitter on the construction of the steam generator plant within the grounds of Norfolk Naval shipyard at the time of his injury.

8. Claimant sustained a 22 percent permanent partial disability to the ring finger of his left hand as a result of the October 16, 1986 accident.

9. The plant, when operational, would supply power to the shipyard.

10. Claimant's average weekly wage at the time of the injury was $528.29.

11. If jurisdiction under the Longshore Act is found, the Employer/Insurer is entitled to a credit for compensation paid under the State Act. (TR 3-5).

Issue

I. Whether the Claimant's injury sustained on October 16, 1986 is subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act.

Findings of Fact and Conclusions of Law

Claimant's Testimony

Claimant waived testifying at the hearing (TR 9) in light of the stipulations of record.

Testimony of Larry J. Howell

Larry J. Howell testified on behalf of the Employer as follows:

Howell testified that he is president of Weyher/Livsey Constructors, Inc., 8601 Dunwoody Place, Suite 530, Atlanta, Georgia. (EX 12, p. 5). As president, Howell has responsibility for overall operations of the company. He has spent a little over 18 years with various units of engineering construction field.

The steam generating plant at Norfolk Naval Shipyard was a joint venture with Dravo Corporation, Weyher/ Livsey's parent company and Sirrine, the engineer of record. (EX 12, p. 7). The Employer herein was the general contractor, Howell is familiar with the steam plant which began construction in mid 1984. He has had occasion to visit the site many times. At the time the Employer was awarded the project and during the course of its construction, Weyher/Livsey Constructors had at least 4 other power plant type projects underway: one was a hydroelectric facility in Boise, Idaho, another was a co-generation facility at Red River Army Depot in Texarkana, Texas, the third was a combined fuel cogeneration facility in Florence, South Carolina and fourth was a garbage burning facility for Regional Waste Systems in Portland, Maine. The same skills would be used to construct the facility at Norfolk Naval

Shipyard as to construct any other facility. It was not affected by the fact that it was on the grounds of the Shipyard. (EX 12, p. 10).

On cross-examination, Mr. Howell testified that the plant generates electricity which was used for the Shipyard's administrative offices, and ship repair operations. (DX 12, pp. 19 and 20),

On re-direct, Howell testified that to his knowledge the work of his employees at the Shipyard plant did not differ from the work of his employees at the other plants because the plant lay in proximity to navigable waters. (DX 12, p. 21).

Testimony of Durwood Curling

Durwood Curling testified on behalf of the Employer as follows:

Curling is the Executive Director of the Southeastern Public service Authority of Virginia which is a political subdivision of the State of Virginia. Its function is to accept from and manage the disposal of the municipal solid waste in 8 communities in South Hampton Roads. Southeastern Public Service Authority owns and operates a municipal solid waste processing plant in the City of Portsmouth. One of the purposes of the plant is to produce fuel for a power plant located on Norfolk Naval Shipyard property. The original study called for the agency to own and operate both facilities: the waste processing plant and the power plant which would produce steam and electricity for the Shipyard. In the summer of 1980, the Navy made a decision that rather than having the State agency build both sides of the project, the Navy would build, own and operate the power plant and they

would purchase fuel from the agency. In 1984, the agency entered into a contract with the Navy which set forth the structuring of the project. The steam plant operated by the Navy and the agencies trash processing plant which produces the fuel are currently located on two separate sites approximately 1000 feet apart. (DX 2, p. 8). The plant has design capabilities of burning 500,000 tons per year of refuse-derived fuel of processed garbage. In 1988, the plant burned less than 200,000 tons. The plan is for the agency to take over the plant and increase its use up to its designed capacity and help with the solid waste disposal problem.

Jurisdiction

In order for a claimant to establish jurisdiction under the Act the Claimant must satisfy a two part test. The Claimant must establish: (1) that he was injured while working on a covered maritime situs within Section 3(a) of the Act and (2) that his status was that of a maritime employee within Section 2(3) of the Act. P.C. Pfeiffer Co., Inc., v. Ford, 444 U.S. 69, 11 BRBS 320 (1979); Northeast Marine Terminals Co., Inc, V. Caputo, 432 U.S. 249, 6 BRBS 150 (1977).

At the time of his injury, Claimant was employed by Weyher/Livsey in the construction of the steam generation plant located within the boundaries of Norfolk Naval Shipyard. (See Stipulation of Parties). I find that the plant's location at Norfolk Naval Shipyard qualifies as a maritime situs for the purposes of the Longshore Act.

Turning to the second part of the jurisdictional test, status as a maritime employee, the Act provides:

The term "employee" means any person

> engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship breaker . . .
>
> 33 U.S.C. §902(3)

"Maritime Employment" is not defined by the Act, but the Supreme Court has held the term to require an occupational test focusing on loading and unloading. Herb's Welding, Inc. v. Gray, 105 S.Ct. 1421, 1427 (1985) (citing P.C. Pfeiffer Company, Inc. v. Ford, 444 U.S, 69, 80 (1979)). The Act sets forth a test for situs under §3(a), 33 U.S.C. §903(a), and a test for status under §2(3), 33 U.S.C. §902(3), both of which must be satisfied for claim to come within the jurisdiction of the Act. See, P.C. Pfeiffer Company, Inc. v. Ford, supra. The §2(3) status requirement provides part of the basis for the Administrative Law Judge's and the Benefit Review Board's subject matter jurisdiction.

In Sedmak v. Perini North River Associates, 9 BRBS 378, BRB Nos. 77-896 et al. (1979), rev'd on other grounds Fusco v. Pereni North River Associates, 601 F.2d 659, 10 BRBS 624 (2d Cir. 1979), vacated and remanded, 100 S. Ct. 697 (1980), aff'd on remand No. 79-4006 et al., 12 BRBS 328 (2d Cir. June 4, 1980), the Benefits Review Board concluded that a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be considered maritime employment under §2(3). The Supreme Court had held in Northeast Marine Terminal Co., v. Caputo, 432 U.S. 249, 267 (1977) that to be covered under the Act, a worker on the situs must be engaged in the overall process of loading or

unloading vessels and spend, at least some of his time, in indisputable longshore operations. In applying these standards, the courts have looked to the employee's regularly assigned job duties as a whole to determine whether "some" of his time is spent in indisputable longshore operations. Malone v. Howard Fuel Company, 16 BRBS 364 (1984); Levins v. Benefits Review Board, U.S. Department of Labor, 724 F.2d 4, 16 BRBS 24(CRT); Schwabenland v. Sanger Boats, 683 F.2d 309 (9th Cir. 1982), cert. denied, 103 S. Ct. 814 (1983).

A number of court decisions have noted that the test of status under the Act is an occupational one.

> . . . The Act focuses primarily on occupation - longshoreman, harbor worker, ship repairman, ship builder, ship breaker. Both the text and history demonstrate a desire to provide continuous coverage throughout their employment to those amphibious workers who, without the amendments, would be covered for only part of their activity. It seems clear, therefore, that when Congress said it wanted to cover "longshoremen" it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the amendments, would be covered for only part of their activity.

Conti v. Norfolk and Western Railway Co., 566 F.2d 890, 895 (4th Cir. 1977) (citing Northeast Marine Terminal Co., Inc. v. Caputo, supra.

According to the Court in Conti, in order to be

covered under the LHWCA for injuries sustained while on land, the injured employee' s work must have a "realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.'" Id. at 895. The courts have recognized that even in those cases in which a worker "spent some portion of his time in indisputable longshoring activities," the time spent may be so minimal or irregular as to not afford status jurisdiction under the Act. See, e.g., Lavillette v. Regan Equipment, 20 BRBS 301, 304-305 (ALJ, 1987); Foret v. Dolphin Services, 19 BRBS 156, 166 (ALJ, 1986). See also, Henry v. Gentry Plumbing and Heating Co., 18 BRBS 95 (BRB 1986).

I find from the evidence summarized above that Claimant's mission was the construction of the power plant and when that job was completed, Claimant would move on to another location not necessarily on shipyard premises. He was not even a power plant worker in the sense that he was an integral part of supplying electrical power.[2] Claimant delivered (constructed) the wherewithal (plant) so someone else could supply electrical power. His involvement in the construction of a power plant does not qualify as having "a realistically significant relationship to traditional maritime activities involving navigation commerce on navigable waters," Conti, supra, at 895. Claimant's pipefitting job was not inherently maritime, it involved tasks which were identical to those performed by Weyher/Livsey pipe fitters working on other power plant projects that had no connection to maritime commerce, and the nature of claimant's tasks were not altered by the maritime environment. There was nothing uniquely maritime about Claimant's pipefitting work and he could just as easily have been working on a power

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[2] I don't mean to imply that if Claimant was a power plant worker there would be jurisdiction.

plant under construction for any other industrial customer. If Claimant's job qualified as a maritime activity, than (sic) so would the workers at the trash processing plant only 1,000 feet away.[3]

Conclusion

The above considered, I find that Claimant's injury sustained on October 16, 1986 is not subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act.

Attorney Fees

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case the Act prohibits the charging of any fee to the claimant for representation services rendered to him in pursuit of his claim.

ORDER

IT IS ORDERED that Thomas C. Prevetire's claim for disability benefits under the Longshore and Harbor Workers' Compensation Act is hereby denied.

\s\ Michael P. Lesniak
MICHAEL P. LESNIAK
Administrative Law Judge

MPL/lkw
Dated: March 28, 1990
Hampton Virginia

---

[3] But for the situs requirement.

APPENDIX E

STATUTORY PROVISIONS

The Longshore and Harbor Workers' Compensation Act, as codified at 33 U.S.C §§ 901 *et seq.*, provides in full part:

§ 902(3) The "status" criterion

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include --
>
> > (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
> >
> > (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
> >
> > (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
> >
> > (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of a [maritime] employer . . . , and (iii) are not engaged in work normally performed by

employees of that employer under [the Act];

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. § 902(3) (1988).

FILED
FEB 24 1995

No. 94-1267

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

THOMAS C. PREVETIRE,

Petitioner-Claimant,

V.

WEYHER-LIVSEY CONSTRUCTORS, INC.,

Respondent-Employer,

and

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY,

Respondent-Carrier.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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February 24, 1995

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801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether an employee involved in the construction of a steam and electrical power plant, the primary purpose of which was to provide power for the Norfolk Naval Shipyard, is a "maritime employee" under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1988)?

TABLE OF CONTENTS

STATEMENT OF THE CASE 2

REASONS TO DENY THE WRIT 4

I. The court of appeals properly interpreted and applied this Court's precedent regarding the Longshore Act's "status" test to the facts of this case. 4

II. The decision of the court of appeals does not create a conflict between the Fourth Circuit and decisions of other circuits, namely, the decisions in Graziano and Hullinghorst 8

III. The decision of the Fourth Circuit is not in conflict with its decisions in Joyner, Price, and Pittman 11

CONCLUSION 15

TABLE OF AUTHORITIES

Cases:

Alabama Dry Dock & Shipbuilding Co. v. Kininess,
554 F.2d 176 (5th Cir.), cert. denied,
434 U.S. 903 (1977) 9

Boudloche v. Howard Trucking Co. Inc.,
632 F.2d 1346 (5th Cir. 1980),
cert. denied, 452 U.S. 915 (1981) 8

Bradshaw v. McCarthy,
3 BRBS 195 (1976), petition for review denied,
547 F.2d 1161 (3d Cir. 1977) 9

Brown & Root, Inc. v. Joyner,
607 F.2d 1087 (4th Cir. 1979), cert. denied, 446
U.S. 981 (1980) 12

Chesapeake & Ohio Ry. Co. v. Schwalb,
493 U.S. 40 (1989) 4-9, 12, 14, 15

Conti v. Norfolk & Western Ry. Co.,
566 F.2d 890 (4th Cir. 1977) 3

Graziano v. General Dynamics Corp.,
663 F.2d 340 (1st Cir. 1981) 9

Herb's Welding, Inc. v. Gray,
470 U.S. 414 (1985) 5, 6

Hullinghorst Industries, Inc. v. Carroll,
650 F.2d 750 (5th Cir. 1981), cert. denied,
454 U.S. 1163 (1982) 9

Humphreys v. Director, OWCP,
834 F.2d 372 (4th Cir. 1987) 8

Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. Denied, 439 U.S. 979 (1978) 9

Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978) 9, 13

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) 5

Odom Constr. Co. v. United States Dep't of Labor, 622 F.2d 110 (5th Cir. 1980) 11

P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979) 5

Pittman Mechanical Contractors, Inc. v. Director, OWCP, 35 F.3d 122 (1994) 12

Price v. Norfolk & Western Ry. Co., 618 F.2d 1059 (4th Cir. 1980) 8, 12, 13

Trotti & Thompson v. Crawford, 631 F.2d 1214 (5th Cir. 1980) 8

Warren Bros. v. Nelson, 635 F.2d 552 (6th Cir. 1980) 8

Statutes:

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3) (1988) 2, 5, 6, 8
33 U.S.C. § 903(a) (1988) 4

No. 94-1267

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

THOMAS C. PREVETIRE,
Petitioner-Claimant

v.

WEYHER-LIVSEY CONSTRUCTORS, INC.
Respondent-Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,
A MUTUAL COMPANY
Respondent-Carrier.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

Respondents, Weyher-Livsey Constructors, Inc., (hereinafter "Weyher-Livsey" or "Employer") and Employers Insurance of Wausau, a Mutual Company,

(hereinafter "Carrier")[1], by counsel, respectfully request that this Court deny the Petition for a Writ of Certiorari which seeks review of the Fourth Circuit's opinion below. The opinion of the Fourth Circuit in this case is reported at 27 F.3d 985 (4th Cir. 1994), and is reprinted in full in the Petition for a Writ of Certiorari at Appendix A.

STATEMENT OF THE CASE

Prevetire filed a claim for compensation benefits under the Longshore and Harbor Workers' Compensation Act (hereinafter "Longshore Act" or "LHWCA"), as the result of a work-related injury which he suffered on October 16, 1986. At the time of his accident, Prevetire was employed by Weyher-Livsey, as a pipefitter. He was working on a project involving the construction of a power plant located within the confines of the Norfolk Naval Shipyard, in Portsmouth, Virginia. The Employer and Carrier denied liability for compensation benefits under the LHWCA, asserting that Prevetire was not a "maritime employee" as defined in § 902(3) of the Longshore Act.

A hearing on Prevetire's claim was held before an administrative law judge on December 4, 1989. Following that hearing, the ALJ issued his decision and order on April 2, 1990. See App. D, pp. 24a-33a.[2] He denied Prevetire's claim under the LHWCA, holding that Prevetire lacked status as a maritime employee. The ALJ found that Prevetire's work as a pipefitter engaged in the construction of a power plant "does not qualify as having a 'realistically significant relationship to' traditional maritime activity involving navigation and commerce on navigable waters."

---

[1]A full listing of the parties is provided in the caption and in the "Parties" section of the Petition for a Writ of Certiorari. There are no parent or subsidiary companies to be listed, as required by Rule 29.1., for either respondent.

[2]References to the Appendix are to the Appendix contained in the Petition for a Writ of Certiorari filed on January 24, 1995.

App. D, p. 32a. (citing Conti v. Norfolk & Western Ry. Co., 566 F.2d 890, 895 (4th Cir. 1977)).

Prevetire appealed the decision of the ALJ to the Benefits Review Board (hereinafter "the Board"). In a decision and order dated May 12, 1993, the Board reversed the ALJ, holding that Prevetire was a "maritime employee" because he was engaged in the construction of a new power plant which was to supply steam and electricity to the shipyard. Therefore, the new power plant was maritime in nature and, as a result, Prevetire's work in constructing the plant was also maritime in nature. Further, the Board held that the construction of the power plant was essential to the shipyard's operation and therefore so was Prevetire's work in constructing the power plant. See App. C, p. 20a-21a.

The Employer and Carrier appealed the decision of the Board to the Court of Appeals for the Fourth Circuit. The case was decided on June 29, 1994. The court of appeals reversed the decision of the Board, finding that the Board's expansive view of maritime employment is inconsistent with the LHWCA and its 1972 amendments. See App. A, p. 8a. The court found that Prevetire was not engaged in maritime employment simply because the power plant being built would eventually provide steam and electricity to shipbuilding and ship repair operations. See Id. The activities being performed by Prevetire were not inherently maritime. "The nature of a particular job is, of course, defined in part by its location, . . . ; but to classify Prevetire's employment as maritime, merely because the power plant that he was helping to construct would lie on the seaward side of the shipyard's boundary, would blur together the 'situs' and 'status' requirements which Congress intended to make distinct." Id. at 10a. Thus, the court found that Prevetire's suggested construction of the LHWCA would effectively read the "status" requirement out of the Act. See Id.

Prevetire filed a Petition for Rehearing with Suggestion for Rehearing In Banc, arguing that the court's opinion

misconstrued prior decisions of the United States Supreme Court and is contrary to decisions of the Fourth Circuit and other federal appellate courts interpreting the LHWCA's status test. The original panel voted to deny rehearing. A member of the court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny the rehearing in banc. See App. B, p. 15a.

REASONS TO DENY THE WRIT

Prevetire has set forth insufficient reasons for this Court to grant a writ of certiorari in this case. The Court of Appeals for the Fourth Circuit did not misconstrue or misapply prior precedent of this Court, namely, Chesapeake & Ohio Ry. Co. v. Schwalb, 493 U.S. 40 (1989), and its decision is not in conflict with prior decisions of the Fourth Circuit or other circuit courts of appeals. Although the precise factual situation presented herein has not been addressed before, there is substantial precedent on this issue, which precedent was correctly interpreted by the Fourth Circuit. Therefore, the Employer and Carrier respectfully pray that this Court deny the Petition for a Writ of Certiorari.

I. The court of appeals properly interpreted and applied this Court's precedent regarding the Longshore Act's "status" test to the facts of this case.

The 1972 amendments to the Longshore Act expanded the covered situs shoreward to include injuries not only occurring on navigable waters, but those occurring on "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a) (1988). Recognizing that this new situs provision created a broad geographic area of coverage, Congress also enacted a limiting provision so that employees injured on a covered

situs could only receive compensation under the LHWCA if they were an employee as defined in § 902(3). This section defines employee, in pertinent part, as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, ship builder and ship-breaker . . . ." 33 U.S.C. § 902(3) (1988). The statute, however, sets forth no definition of "maritime employment."

Since 1972, there have been four major Supreme Court cases which have attempted to define the term "maritime employment" in the context of a worker injured on land. See Chesapeake & Ohio Ry. Co. v. Schwalb, 493 U.S. 40 (1989); Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979); and Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977). There have also been innumerable opinions from the courts of appeals, which have sought to determine Congress' intent in enacting the 1972 amendments and, thereby, define the limits of the term "maritime employment."

The Herb's Welding case discusses at length the purpose of the maritime employment requirement as well as its limitations.

> Expansion of the definition of navigable waters to include rather large shoreside areas necessitated an affirmative description of the particular employees working in those areas who would be covered. This was the function of the maritime employment requirement. But Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those on the situs who are involved in the essential elements of loading and unloading . . . . While 'maritime employment' is not limited to the occupations specifically mentioned in § 2(3), neither can it be read to

> eliminate any requirement of a connection with the loading or construction of ships . . . . The amendments were not meant to 'cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity . . . .' We have never read 'maritime employment' to extend so far beyond those actually involved in moving cargo between ship and land transportation.

470 U.S. at 423-24 (citations and footnotes omitted). The Court re-emphasized that the maritime employment requirement is "an occupational test that focuses on loading and unloading." Id. at 424. Thus, the mere fact that the claimant worked on a covered situs or in a marine environment does not afford status under the Longshore Act.

The more recent Schwalb decision reaffirmed the vitality of the tests set forth in Herb's Welding and its predecessor cases. As stated by the court of appeals, this Court "has repeatedly held that, aside from the occupations specifically named in § 902(3), 'land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel.'" App. A, p. 7a (quoting 493 U.S. at 45-46) (emphasis added)). "In Schwalb, the Court held 'that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act' because they 'are engaged in activity that is an integral part of and essential to those overall processes.'" Id. at 8a. (quoting Schwalb, 493 U.S. at 47). Prevetire, however, asked the court of appeals to extend Schwalb and hold that a pipefitter who was employed in the construction of a power plant was engaged in work that was an integral or essential part of shipyard operations merely because the power plant would ultimately provide steam and electricity for the shipyard. The court properly determined

that such an expansive view of maritime employment is inconsistent with the LHWCA and its 1972 amendments.

In Schwalb, this Court held that railroad employees who maintained and repaired equipment used in the loading of coal from railcars onto ships, were an integral part of and essential to the overall loading and unloading process of the ships. The Court noted that while the machinery used was not operating properly, or was being repaired, the loading process stopped. Therefore, the repair work was an essential function covered by the LHWCA. See 493 U.S. at 47-48. In the present case, there is not the same essential connection between the work being performed by Prevetire and the operation of the shipyard. Although energy from the power plant would ultimately be used to run the shipyard's operations,[3] the shipbuilding and repair processes did not and would not have stopped without construction of a new power plant. The shipyard had existed for years without the power plant being constructed and would have continued its work, uninterrupted, even if the plant had never been built. Something is essential when it is indispensable or unavoidable. In the present case, the work being performed by Prevetire at the time of his injury was not indispensable to the operations of the shipyard. As stated by the court of appeals, Prevetire's pipefitting is far removed from traditional LHWCA activities such as longshoring, and was of a nature not significantly altered by the marine environment. See App. A, p. 9a. The only connection between Prevetire's work and traditional maritime activities is that power from the plant would eventually be used by the shipyard. Prevetire argues that this connection is enough to make the work he was performing essential to the operations of the shipyard. However, the Employer and Carrier maintain, as the court of appeals found, that this connection is too tenuous.

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[3]Some of the electricity generated by the power plant was also to be sold to users outside the shipyard.

As noted by the court of appeals, if the power plant had been built just outside the shipyard's boundary rather than just inside it, as it easily could have been, Prevetire's job would not have changed at all. See App. A, p. 10a. The court of appeals properly determined that to hold Prevetire covered by the Longshore Act would "blur together the 'situs' and 'status' requirements which Congress intended to make distinct . . ., and would effectively read the 'status' requirement out of the Act." Id. (citing for comparison Humphreys v. Director, OWCP, 834 F.2d 372, 375 (4th Cir. 1987) ("Were we to read the . . . requirements so broadly as to embrace this claim, . . . we would come perilously close to eliminating it entirely."), cert. denied, 485 U.S. 1028 (1988)). Thus, the court of appeals properly applied the test set forth in Schwalb to the facts of this case and was correct in holding that Prevetire was not "'engaged in maritime employment' within the meaning of the Act, 33 U.S.C. § 902(3)." App. A, p. 11a.

II. The decision of the court of appeals does not create a conflict between the Fourth Circuit and decisions of other circuits, namely, the decisions in Graziano and Hullinghorst.

Prevetire asserts in his Petition for a Writ of Certiorari that the decision below creates a conflict between the Fourth Circuit and other circuits. In support of his assertion and in addition to the two cases specifically discussed, Prevetire notes a line of cases which have held that employees involved in the maintenance or repair of machinery utilized in the shipbuilding, ship repair, or ship unloading process, are covered under the Longshore Act.[4] The

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[4]Warren Bros. v. Nelson, 635 F.2d 552, 556 (6th Cir. 1980); Boudloche v. Howard Trucking Co. Inc., 632 F.2d 1346, 1347 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981); Trotti & Thompson v. Crawford,, 631 F.2d 1214, 1220-21, n.5 (5th Cir. 1980); Price v. Norfolk & Western Ry. Co., 618 F.2d 1059, 1061 (4th Cir. 1980);

Employer and Carrier do not dispute the holdings in the noted cases. However, since the 1972 amendments, the courts have struggled to draw meaningful lines defining the scope of coverage under the LHWCA. Each case turns primarily upon its facts as they are applied to the law. Therefore, the Employer and Carrier maintain that the court of appeals' decision below is not in conflict with prior decisions of other circuits, and is specifically not in conflict with Graziano v. General Dynamics Corp., 663 F.2d 340 (1st Cir. 1981), or Hullinghorst Industries, Inc. v. Carroll, 650 F.2d 750 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982).

Both of the cases relied upon by Prevetire as being in conflict with the Fourth Circuit's decision below, were decided prior to this Court's decisions in Herb's Welding and Schwalb. Accordingly, they should not be considered controlling precedent for purposes of determining whether a legitimate conflict exists between the circuits such as to warrant granting Prevetire's Petition for a Writ of Certiorari. The case at bar is factually distinguishable from both Graziano and Hullinghorst, and was decided correctly based on the controlling precedent of this Court.

In Graziano, the claimant was injured and subsequently died as a result of a lung disease contracted over years of employment with General Dynamics. The claimant was a maintenance-mason, whose duties "primarily involved the repair of masonry and shipyard buildings, but also included digging ditches, breaking up concrete with a jackhammer, laying cement, grouting, removing asbestos from pipes, repairing boilers and manholes, and cleaning acid tanks." 663 F.2d at 341. The court therein reversed the decision of the Benefits Review Board, denying coverage

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Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978); Alabama Dry Dock & Shipbuilding Co. v. Kininess, 554 F.2d 176, 178 (5th Cir.), cert. denied, 434 U.S. 903 (1977); Bradshaw v. McCarthy, 3 BRBS 195 (1976), petition for review denied, 547 F.2d 1161 (3d Cir. 1977).

to Graziano, stating that the language of the 1972 amendments is broad and suggests an expansive view of coverage. See Id. at 342. In finding Graziano covered by the Act, the First Circuit stated:

> [t]he maintenance of the structures housing shipyard machinery and in which shipbuilding operations are carried on is no less essential to shipbuilding than is the repair of the machinery itself . . . Graziano's maintenance and repair of shipyard facilities was essential to the building and repairing of ships . . . [T]he shipbuilding process of General Dynamics would not have come to an immediate halt if Graziano's duties were not successfully discharged, but the failure to perform routine maintenance would have led eventually to a stoppage or curtailment of shipbuilding and repairs.

663 F.2d at 342-43.

Based on the above language, Graziano is distinguishable from this case. Graziano performed work upon traditional maritime facilities and the court found his work essential to the processes of building and repairing ships. The First Circuit stated that "Graziano's work was a necessary link in the chain of work that resulted in ships being built and repaired." Id. at 343. Prevetire's work, on the other hand, was not such a necessary link. The shipyard functioned prior to the construction of the power plant upon which Prevetire was working, and continued to function during the course of construction and Prevetire's work. Prevetire was not involved in the construction, maintenance or repair of any structures housing shipyard machinery or in which shipbuilding operations were carried on. His work was not essential to the traditional maritime activities of shipbuilding, ship repair, or the loading and unloading of ships. The failure of Prevetire to perform the work in question would not have led to either a stoppage or a curtailment of the shipyard's operations.

Likewise, Hullinghorst is also distinguishable. In that case, the claimant suffered a back injury while erecting a scaffold beneath a pier extending out over the Mississippi River. The sole purpose of the scaffold was to provide a place for other employees to stand in order to repair a turntable used in the loading and unloading of vessels. Although the claimant had no direct role in the actual repair work on the turntable, the Fifth Circuit found that "[t]he scaffolding work at issue in the present case was part of an ongoing pier repair project involving the repair of a turntable (affixed to the pier) used by longshoremen in the loading and unloading of ships." 650 F.2d at 756. The court found that the claimant's work in erecting the scaffolding was "an essential and indispensable step in the repairs to be effected." Id. Quoting an earlier decision of the Fifth Circuit, the court further found that the claimant's activities bore a "realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters' . . . ." 650 F.2d at 756 (quoting Odom Constr. Co. v. United States Dep't of Labor, 622 F.2d 110, 113 (5th Cir. 1980)).

In Hullinghorst, the claimant was directly involved in the repair of a piece of machinery, affixed to a pier, and used by longshoremen in the loading and unloading of ships. Prevetire's work, however, was not such an integral part of either the loading and unloading operations at the shipyard or the shipbuilding and repair operations. The Employer and Carrier continue to maintain that the Fourth Circuit correctly determined that Prevetire's work was not essential to the shipyard's operations and traditional maritime activities. Contrary to the position argued by Prevetire, the Employer and Carrier assert that both the First Circuit and the Fifth Circuit would have found that Prevetire did not meet the status requirement of the Longshore Act.

III. The decision of the Fourth Circuit is not in conflict with its decisions in Joyner, Price, and Pittman.

Prevetire argues in his Petition for a Writ of Certiorari that the decision below is in conflict with other decisions decided by the Fourth Circuit, primarily Brown & Root, Inc. v. Joyner, 607 F.2d 1087 (4th Cir. 1979), cert. denied, 446 U.S. 981 (1980); Price v. Norfolk & Western Ry. Co., 618 F.2d 1059 (4th Cir. 1980); and Pittman Mechanical Contractors, Inc. v. Director, OWCP, 35 F.3d 122 (1994). Both Joyner and Price were decided prior to this Court's decision in Schwalb, but all three are distinguishable from the facts of this case.

In Joyner, the employer was engaged as an independent contractor to construct an additional shipyard for building and servicing liquified natural gas vessels. The construction included the building of a permanent dry dock for building and repair of ships and related structures such as craneways and assembly areas. The new yard was built on filled land in an area that was formerly a shallow, navigable part of the James River. Joyner, a general excavation foreman, was killed by a tractor while supervising the loading of sand being used to grade the yard and backfill the concrete walls of the dry dock. Stewart, a painter/sandblaster, worked all over the project, and was injured while loading a generator and bags of sand onto a truck for transport to the dry dock. See 607 F.2d at 1089. The Fourth Circuit found that Stewart and Joyner were both engaged in building a dry dock and thus, were engaged in maritime employment. "We have held, under the earlier version of the Act, that employees building and repairing dry docks are engaged in maritime employment." Id. Interestingly, dry docks are a covered situs both prior to and subsequent to the 1972 amendments. As emphasized by the court of appeals, a dry dock is peculiarly a maritime facility. See Id. The claimants therein were not found to be engaged in maritime employment simply because they were engaged in the construction of shipyard facilities

critical to the entire shipyard operation, as suggested by Prevetire. Rather, both claimants therein were working to construct a traditionally maritime facility. Such facts are clearly distinguishable from the present case wherein the claimant was engaged in the construction of a power plant, which is not a traditionally maritime facility.

Prevetire suggests that it is noteworthy that the court of appeals did not even address its prior decision in Joyner in the decision below. It is not necessary that the court of appeals discuss and distinguish every one of its prior decisions which may be applicable in some fashion. As set forth above, Joyner is distinguishable on its facts from the case at bar. Therefore, the court of appeals did not need to consider or discuss Joyner. There is no irreconcilable conflict, as Prevetire asks this Court to find, because the court of appeals found a distinction between the construction of a dry dock, a traditional maritime facility, and the construction of a power plant, which is not a traditional maritime facility, and which has no maritime nexus except for its location.[5]

Prevetire also argues that the Fourth Circuit's decision in Price v. Norfolk & Western Ry. Co., 618 F.2d 1059 (1980), conflicts with the decision below. Price was injured while painting support towers for equipment used in the loading and unloading of vessels at the Sewells Point

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[5]The Employer specialized in the construction of small power plants located in many parts of the country. During this same time period, the employer had four other power plants under construction. These included a hydroelectric facility in Idaho; a co-generation plant at the Red River Army Depot in Texarkana, Texas; a combined fuel, co-generation plant for Stone Container Corp. in Florence, South Carolina; and a garbage burning facility for Regional Waste Systems in Portland, Maine. The plant being constructed at Norfolk Naval Shipyard was not unique in any way as compared to the other power plants that had been constructed, or were being constructed, by the Employer. Furthermore, construction of the plant, nor Prevetire's own work, were affected in any way by the fact that the plant was near navigable water or was intended to provide power to a shipyard.

port facility. Relying on Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978), the court found that Price was engaged in "maritime employment," since he was painting a structure essential to the loading and unloading process. The court, therefore, held that a person who maintains longshoring machinery is covered under the Act. See Id. at 1061.

Price, although decided prior to this Court's decision in Schwalb, is consistent therewith, and does not affect the outcome of the present case. Prevetire was not engaged in work that is an essential part of loading and unloading ships or other longshoring activities. The court of appeals did not draw a distinction, as suggested, between ship repair/construction and ship loading/unloading. Rather, it found the work performed by Prevetire not essential to any of the shipyard's longshoring operations. The mere fact that power from the power plant being constructed by Prevetire would ultimately be used to support those operations is too tenuous a connection to establish coverage under the Longshore Act.

Finally, Prevetire argues that the Fourth Circuit's recent decision in Pittman is also at odds with the decision below. In that case, the claimant alleged that he sustained a back injury while working as a pipe welder for Pittman. At the time of his injury, he was assigned to a project on Pier 12 at the Norfolk, Virginia Naval Operations Base. Pittman had contracted to construct pipelines for the pier, which involved removing the old pipelines and replacing them with new pipelines. The pipelines were used to load fuel, steam and water onto the vessels when they were docked at the pier.

As in the present case, the court was called upon to determine whether the claimant met the "status" requirement of the Longshore Act. In analyzing the facts of the case, the court of appeals followed this Court's decision in Schwalb, which requires that for land-based activity to be

considered maritime employment, it must be an "integral or essential part of loading or unloading a vessel." 35 F.3d at 125 (quoting 493 U.S. at 45). As stated by this Court in Schwalb, "employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act." 493 U.S. at 47. The court of appeals found that the pipelines being installed and repaired by the claimant were the only available means of transport to load the supplies essential to the ships' operation. See 35 F.3d at 126. "The necessity of these items is demonstrated by the fact that Pier 12 could not be used for docking purposes while the pipelines were out of commission." Id. Therefore, as discussed by the court of appeals, Pittman is distinguishable on its facts from the present case. The longshoring operations in the shipyard were not out of commission while Prevetire performed his work in connection with construction of the power plant, and his work was not essential to those operations. Even though the LHWCA is to be liberally construed, Congress did not intend that every one who sets foot upon a covered situs be considered a maritime employee. Accordingly, the Fourth Circuit properly found that Prevetire was not engaged in maritime employment at the time of his injury and is therefore not covered under the Longshore Act.

CONCLUSION

For the foregoing reasons, the Employer and Carrier respectfully pray that Prevetire's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1994

THOMAS C. PREVETIRE, PETITIONER

v.

WEYHER/LIVSEY CONSTRUCTORS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a pipefitter who works on the premises of a naval shipyard in the construction of a power plant intended to provide steam and electricity for shipbuilding and ship repair work at the shipyard is "engaged in maritime employment," and is therefore a covered employee under Section 2(3) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Brown & Root, Inc. v. *Joyner*, 607 F.2d 1087 (4th Cir. 1979), cert. denied, 446 U.S. 981 (1980)	13, 14
Chesapeake & Ohio Railway Co. v. *Schwalb*, 493 U.S. 40 (1989)	3, 5, 7, 8, 10, 12
Coloma v. *Director, OWCP*, 897 F.2d 394 (9th Cir.), cert. denied, 498 U.S. 818 (1990)	12
Director, OWCP v. *Perini N. River Assocs.*, 459 U.S. 297 (1983)	13
Dravo Corp. v. *Banks*, 567 F.2d 593 (3d Cir. 1977)	11
Dravo Corp. v. *Maxin*, 545 F.2d 374 (3d Cir. 1976), cert. denied, 433 U.S. 908 (1977)	9, 11
Graziano v. *General Dynamics Corp.*, 663 F.2d 340 (1st Cir. 1981)	4, 11
Herb's Welding, Inc. v. *Gray*, 470 U.S. 414 (1985)	5, 7, 8, 10
Hullinghorst Industries v. *Carroll*, 650 F.2d 750 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982)	12
Munguia v. *Chevron U.S.A. Inc.*, 999 F.2d 808 (5th Cir. 1993), cert. denied, 114 S. Ct. 1839 (1994)	12
Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 (1977)	2, 7, 9
P.C. Pfeiffer Co. v. *Ford*, 444 U.S. 69 (1979)	7, 8, 9
Pittman Mechanical Contractors, Inc. v. *Director, OWCP*, 35 F.3d 122 (4th Cir. 1994)	13

Cases—Continued:

	Page
Price v. *Norfolk & Western Railway*, 618 F.2d 1059 (4th Cir. 1980)	13
Wisniewski v. *United States*, 353 U.S. 901 (1957)	12

Statutes and regulations:

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*	2
33 U.S.C. 902(3)	2, 7, 8, 9, 10, 12
33 U.S.C. 902(3)(A)-(H)	2
33 U.S.C. 903(a)	2
33 U.S.C. 903(e)	3
33 U.S.C. 908(c)(10)	3
33 U.S.C. 908(c)(19)	3
Va. Code Ann. (Michie 1991):	
§ 65.2-503B.4	3
§ 65.2-503D	3
20 C.F.R.:	
Section 701.301(a)(12)	2
Section 802.410(b)	4

Miscellaneous:

Employment Standards Admin., U.S. Dep't of Labor, *LHWCA Program Memorandum No. 58: Guidelines for Determination of Coverage of Claims Under Amended Longshoremen's Act* (Aug. 10, 1977)	9, 13
National Research Council, *Personnel Requirements for an Advanced Shipyard Technology* (1980)	9

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 27 F.3d 985. The decisions and orders of the Benefits Review Board (Pet. App. 16a-23a) and the administrative law judge (Pet. App. 24a-33a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 29, 1994. The court denied petitions for rehearing filed by petitioner and by the Director of the Office of Workers' Compensation Programs (OWCP) on October 26, 1994. Pet. App. 14a-15a. The petition for a writ of certiorari was filed on January 24, 1995. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, provides compensation to employees who are injured while working on a maritime "situs," *i.e.*, on navigable waters and certain adjoining land areas, 33 U.S.C. 903(a), and who satisfy a "status" requirement of being an "employee," *i.e.*, a person engaged in "maritime employment." 33 U.S.C. 902(3); see *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265 (1977). The LHWCA does not define "maritime employment," but it states that an "employee" "includ[es] any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. 902(3). Workers engaged in certain occupations are specifically excluded from coverage under the Act, if they are covered under a state workers' compensation law. 33 U.S.C. 902(3)(A)-(H); see 20 C.F.R. 701.301(a)(12).

2. Petitioner is a pipefitter who worked for respondent Weyher/Livsey Constructors, Inc., the general contractor on a project to build a power plant to replace an old plant at the Norfolk Naval Shipyard. Pet. App. 2a, 17a, 26a. Most of the steam and electrical power from the new plant was to be used for shipbuilding, ship repair operations, and administrative offices. *Id.* at 2a, 17a, 28a.

On October 16, 1986, in the course of his employment, petitioner injured the ring finger of his left hand. Pet. App. 17a-18a, 26a. He received benefits under a state workers' compensation law, and sought

additional compensation under the LHWCA.[1] Weyher/Livsey and its insurer, respondent Wausau Insurance Company, conceded that Prevetire had suffered a work-related injury, but denied that he was covered by the LHWCA. *Id.* at 18a, 26a.

3. An administrative law judge (ALJ) held that the shipyard where petitioner was injured was a maritime "situs," but denied benefits on the ground that petitioner was not engaged in "maritime employment." Pet. App. 29a-33a. The ALJ reasoned that, as petitioner was a land-based worker, his employment had to have a "realistically significant relationship" to "traditional maritime activity" to qualify for coverage under the Act. *Id.* at 32a. Petitioner failed that test, the ALJ concluded, because there was "nothing uniquely maritime" about his pipefitting work. *Ibid.*

4. The Benefits Review Board reversed. Pet. App. 16a-23a. The Board concluded, in light of this Court's decision in *Chesapeake & Ohio Railway Co.* v. *Schwalb*, 493 U.S. 40 (1989), that the proper status inquiry is not whether petitioner was engaged in a "traditional maritime activity," nor whether petitioner's employment was "inherently maritime,"

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[1] Petitioner suffered a "schedule" injury that would have entitled him to 25 weeks of LHWCA compensation at the rate of two thirds of his average weekly wage, proportionately reduced to reflect the 22% impairment to his ring finger. See 33 U.S.C. 908(c)(10) and (19); Pet. App. 26a. That recovery would have been reduced by the amount of his state workers' compensation award, 33 U.S.C. 903(e); Pet. App. 26a, which was less than the LHWCA award. See Va. Code Ann. § 65.2-503B.4 and D (Michie 1991) (20 weeks of compensation at two thirds of employee's average weekly wage, proportionately reduced to reflect degree of impairment).

but whether petitioner's employment was "essential" to the shipbuilding or ship repair operation. Pet. App. 19a-20a. Applying that test, the Board held that petitioner was covered under the Act because "[t]he construction of a power plant at the shipyard is essential to the shipyard's operation, for without electricity and steam no shipbuilding and repair work can be performed." *Id.* at 20a-21a. The Board also viewed petitioner's work as "just as essential" to the shipbuilding and ship repair process as covered "maintenance and repair of the machinery used in the shipbuilding process." *Id.* at 21a (citing, *inter alia*, *Graziano* v. *General Dynamics Corp.*, 663 F.2d 340, 342-343 (1st Cir. 1981)).[2]

5. The court of appeals reversed, concluding that petitioner was not covered by the Act because he was not engaged in maritime employment. Pet. App. 1a-11a. The court recognized that the Director of the Office of Workers' Compensation Programs (OWCP), who represented the Department of Labor in the court of appeals, see 20 C.F.R. 802.410(b), and who agreed with the Board's decision that petitioner was covered, was entitled to deference in her interpretation of "maritime employment." Pet. App. 4a. The court nevertheless rejected the Director's interpretation, believing it to be "both unreasonable and contrary to Congress' clear intent, as expressed in the Act's text and structure." *Id.* at 5a. The court acknowledged, however, that the text of the Act sets

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[2] Administrative Appeals Judge Dolder dissented in part, stating that, although the ALJ had applied the wrong test, the case should be remanded for the ALJ to apply the proper test to the facts of this case. Pet. App. 22a-23a.

forth "no general definition of 'maritime employment.'" *Id.* at 7a.

To support its narrower construction of the Act's coverage, the court of appeals stressed that this Court had "repeatedly held" that land-based activity will be considered maritime employment covered under the Act "only if it is an integral or essential part of loading or unloading a vessel." Pet. App. 7a (quoting *Schwalb*, 493 U.S. at 45-46) (emphasis omitted). The court of appeals believed that *Schwalb*, which had found coverage for persons engaged in the repair and maintenance of machinery used to load and unload ships (see 493 U.S. at 47), could not be extended to the case of a pipefitter "employed in only the construction of a power plant (as distinguished from its later operation or maintenance) * * * simply because the power plant being built would eventually provide steam and electricity to shipbuilding and ship-repair operations." Pet. App. 8a (emphasis omitted). The court also expressed the view that petitioner's claim to coverage was even weaker than the claim of the offshore fixed-platform construction worker rejected in *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414 (1985), because petitioner's duties were "far removed from traditional LHWCA activities, such as longshoring," and did not involve "an inherently maritime task." Pet. App. 9a.

Judge Sprouse dissented. Pet. App. 11a-13a. He concluded that petitioner's construction work was covered under the Act because it was as essential to shipbuilding and ship repair as the maintenance and repair work by the covered claimant in *Schwalb* had been to loading and unloading cargo. *Id.* at 11a-12a. He also distinguished *Herb's Welding* because none of the offshore oil activities in that case had any

relation "to one of the Act's primary purposes—the protection of shipyard workers whose activities affect the loading or unloading of ships" (*id.* at 12a), whereas, in this case, petitioner's work of furnishing electrical power was closely related to maritime work in the shipyard. *Ibid.* Judge Sprouse criticized the majority for not deferring to the Director, who had maintained since 1977 that the kind of construction work involved in this case is covered "maritime employment." *Ibid.*

The court of appeals subsequently denied rehearing en banc, with four judges dissenting. Pet. App. 14a-15a.

ARGUMENT

The court of appeals misunderstood this Court's decisions to hold that land-based employees cannot be engaged in "maritime employment" under the LHWCA unless their work is essential to only one kind of maritime employment, the loading and unloading of vessels. Based largely on that error, the court then denied coverage to a worker who, under the Director's interpretation of the Act, should have been granted coverage because he performed work that was essential to other kinds of maritime employment—namely, shipbuilding and ship repair.

Although the court of appeals' decision is in some tension with decisions of this Court, it is not directly contrary to any specific holding. Moreover, although there is a divergence of views in the courts of appeals on the scope of covered "maritime employment" under the Act, no other court of appeals has considered a case involving a similar set of facts, which the court of appeals found crucial in this case. The court below distinguished factual circumstances similar to those

in cases that have arisen in other circuits, in which the employees were held to be covered under the Act. For those reasons, and because the impact of the court's decision is uncertain, review of the court of appeals' "loading and unloading" test is not warranted at this time.

1. As discussed above, a land-based claimant like petitioner who sustains a work-related injury on a maritime "situs" is covered by the LHWCA only if he or she also has the "status" of a "person engaged in maritime employment," which the Act defines as "including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. 902(3). By using the term "including," Congress indicated that "maritime employment" is not limited to the specifically mentioned occupations. *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 423 n.9 (1985); see also *Chesapeake & O. Ry.* v. *Schwalb*, 493 U.S. 40, 45 (1989).

The court of appeals placed great reliance on this Court's statement in *Schwalb* that, "aside from the specified occupations, land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." 493 U.S. at 45. That statement in *Schwalb* must be understood, however, in the context of this Court's cases applying an "integral or essential part" test, all of which involved cargo-related operations. Thus, the Court has held that land-based workers involved in "some portion" of the overall "process of loading or unloading a ship" are engaged in "maritime employment," *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 82-83 (1979); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265-279 (1977),

whether the worker is checking and marking cargo, as in *Caputo*, moving cargo, as in *Pfeiffer*, or maintaining and repairing equipment essential to the loading or unloading process, as in *Schwalb*, 493 U.S. at 47.

The Court has not been presented with a case involving land-based activity that was "integral or essential" to another occupation specified in the Act, such as shipbuilding or ship repair, but not longshoring.[3] The Act itself, however, does not confine coverage to longshore workers; it provides coverage equally to "any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. 902(3). If, as the Court held in *Schwalb*, the Act extends coverage to work that is essential to longshore operations, but is not longshoring itself, there is no reason to doubt that the Act also covers employment that is essential to other activities specified in the Act, such as shipbuilding and ship repair.

This Court's understanding of the purpose of the 1972 amendments to the LHWCA also supports a finding of coverage when a land-based activity is essential to shipbuilding or ship repair. As the Court

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[3] The Court has indicated, however, that the LHWCA covers work connected to maritime employment other than longshoring. See *Herb's Welding*, 470 U.S. at 423-424 ("maritime employment" requirement cannot "be read to eliminate any requirement of a connection with the loading *or construction* of ships") (emphasis added); *Pfeiffer*, 444 U.S. at 80 (stating that Congress adopted "an occupational test that focuses on loading and unloading," but also recognizing that "[l]and-based workers who do not handle containerized cargo also may be engaged in loading, unloading, *repairing, or building* a vessel") (emphasis added).

has recognized, one of the "primary motivations" for extension of the LHWCA to land-based workers in 1972 was Congress's recognition that much work once performed on vessels on the navigable waters is now performed on land. *Caputo*, 432 U.S. at 269-270. Congress intended to reach such work, *id.* at 270-271, and "anticipated that some persons who work only on land would receive benefits." *Pfeiffer*, 444 U.S. at 80. Shipbuilding and ship repair, like longshoring, now occur on both sea and land. Employment Standards Admin., U.S. Dep't of Labor, *LHWCA Program Memorandum No. 58: Guidelines for Determination of Coverage of Claims Under Amended Longshoremen's Act* 4 (Aug. 10, 1977); see also *Pfeiffer*, 440 U.S. at 80; *Dravo Corp.* v. *Maxin*, 545 F.2d 374, 380-381 (3d Cir. 1976), cert. denied, 433 U.S. 908 (1977); National Research Council, *Personnel Requirements for an Advanced Shipyard Technology* 38 (1980). Coverage of all land-based employees whose work is essential to shipbuilding and ship repair ensures that workers in those industries, like those in longshoring, will not lose LHWCA benefits merely because of technological changes in their industries.

The court of appeals erred by considering only whether a land-based worker whose occupation is not specifically listed in 33 U.S.C. 902(3) did work that was integral to "loading or unloading." The proper test would consider whether the claimant's activities were integral or essential to any of the activities specified in Section 902(3), including shipbuilding and ship repair; under that test, the court of appeals should have concluded that petitioner was engaged in maritime employment. Unlike the welder in *Herb's Welding*, whose work was essential to offshore oil drilling, but not to any occupation mentioned in the

Act's definition of maritime employment, see 470 U.S. at 422 (offshore oil drilling is not itself "a maritime activity"), petitioner did work that was essential to activities that were part of "maritime employment" under 33 U.S.C. 902(3). See Pet. App. 20a-21a ("without electricity and steam no shipbuilding and repair work can be performed"). It should also make no difference that petitioner was engaged "only [in] the *construction* of a power plant (as distinguished from its later operation or maintenance)," as the court of appeals believed, *id.* at 8a (court's emphasis), as demonstrated by the fact that, in this case, the plant under construction was intended to replace an existing one. *Id.* at 17a.

2. Notwithstanding the court of appeals' errors, review is not warranted in this case. Contrary to petitioner's argument (Pet. 6, 13-15), the court of appeals' decision is not in direct conflict with the holding of *Schwalb*. *Schwalb* held that persons who maintained and repaired loading equipment were engaged in maritime employment because their work was an essential part of the loading and unloading process. 493 U.S. at 47. The Court did not consider the precise question presented in this case: whether work essential to shipbuilding and ship repair is also covered.

Although petitioner argues (Pet. 16-20) that the decision below conflicts with decisions of other courts of appeals, this case is the first one after *Herb's Welding* and *Schwalb* in which a court of appeals has had to decide whether a claimant is engaged in maritime employment when his or her work is "essential" to shipbuilding or ship repair work, but not longshoring. Other courts of appeals have had no occasion to consider the Fourth Circuit's

conclusion that *Herb's Welding* and *Schwalb* require use of a "loading or unloading" test to exclude such workers from coverage.

Moreover, although decisions of other courts of appeals predating *Herb's Welding* and *Schwalb* do take a broader view of the Act's coverage than did the court below in this case, the facts of those cases are sufficiently distinct from the facts of this case that the court below might have found coverage in those circumstances. In *Graziano* v. *General Dynamics Corp.*, 663 F.2d 340, 343 (1981), the First Circuit held that an employee who maintained and repaired shipyard buildings and equipment was engaged in maritime employment because his duties were essential to the construction and repair of ships. The Fourth Circuit might well find coverage for someone in Graziano's position, however, because it characterized the issue in this case as whether a pipefitter "employed in only the *construction* of a power plant (as distinguished from its later operation or maintenance)" met the status requirement. Pet. App. 8a (court's emphasis). Thus, the court below essentially distinguished the facts of *Graziano*. It is also conceivable that the First Circuit would find that construction work on a power plant is not comparable to Graziano's duties, which that court viewed as "a necessary link in the chain of work that resulted in ships being built and repaired." 663 F.2d at 343.[4] Although we do not believe that a distinction

[4] Third Circuit decisions appear to support such a distinction. Compare *Dravo Corp.* v. *Maxin*, 545 F.2d at 380 (burning steel plates to be used in shipbuilding is an "integral part" of such employment) with *Dravo Corp.* v. *Banks*, 567 F.2d 593, 595 (3d Cir. 1977) (routine maintenance work at a shipyard is not an "integral part" of shipbuilding).

between construction and repair is ultimately supportable (see p. 10, *supra*), the courts of appeals have not considered that issue since *Schwalb*.[5]

There is also no direct conflict between the decision below and *Hullinghorst Industries* v. *Carroll*, 650 F.2d 750 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982), as petitioner contends (Pet. 18-19). In that case, the Fifth Circuit held that a carpenter erecting a scaffold on a pier for use in repairing longshoring equipment was engaged in maritime employment because "[i]t was an integral step in a maritime project of the type that could be performed by a typical harborworker," and "directly furthered the maritime goals of the [relevant] port facility—the loading and unloading of ships." 650 F.2d at 756; see also *Schwalb*, 493 U.S. at 44 (citing *Hullinghorst* as a case in which maintenance and repair were found to be essential to loading and unloading). Because *Hullinghorst* involved work essential to longshoring, the Fourth Circuit would likely have found coverage on the same facts.[6]

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[5] In cases involving an alleged connection to loading and unloading, courts of appeals have construed *Herb's Welding* and *Schwalb* to require a land-based worker whose occupation is not listed in 33 U.S.C. 902(3) to show that his or her work is essential to loading or unloading. See *Munguia* v. *Chevron U.S.A. Inc.*, 999 F.2d 808, 811 (5th Cir. 1993), cert. denied, 114 S. Ct. 1839 (1994); *Coloma* v. *Director, OWCP*, 897 F.2d 394, 398-400 (9th Cir.), cert. denied, 498 U.S. 818 (1990).

[6] Petitioner also argues (Pet. 20-31) that review is warranted because the Fourth Circuit's decision in this case conflicts with other decisions of the same court. "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Moreover, it may be possible for the court of appeals to reconcile the decisions cited by petitioner. For

3. The impact of the decision below on LHWCA enforcement is also too uncertain to warrant review at this time. The coverage question in this case arises in an unusual setting (a naval facility building its own power plant) and should directly affect few workers. It is not clear that the court's decision will control cases involving other occupations that are more directly connected to shipbuilding and ship repair. Moreover, the court distinguished "maintenance" of shipyard equipment from the construction at issue in this case. Pet. App. 8a. It is possible that the court of appeals will find maintenance workers to be "shipbuilders" or "harbor workers," and therefore specifically covered under the Act. See *LHWCA Program Memorandum, supra,* at 11-12 (ship repair workers and shipbuilders include "the many trades or crafts represented within the labor force of a shipyard [, and] * * * maintenance functions per-

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example, in *Brown & Root, Inc.* v. *Joyner*, 607 F.2d 1087 (4th Cir. 1979), cert. denied, 446 U.S. 981 (1980), coverage of employees engaged in the construction of a dry dock may have turned on the fact that a dry dock (unlike a power plant) "is peculiarly a maritime facility" that was a covered situs even before the 1972 amendments to the LHWCA. *Id.* at 1089; see *Director, OWCP* v. *Perini N. River Assocs.*, 459 U.S. 297, 323-324 (1983) (1972 amendments manifest "no congressional intent to affect adversely the pre-1972 coverage"). In *Pittman Mechanical Contractors, Inc.* v. *Director, OWCP*, 35 F.3d 122, 125-126 (4th Cir. 1994), the court distinguished the instant case and explained that the employee in that case was covered because his repair of pipelines that were the only means of transporting supplies essential to a ship's docking involved equipment necessary for the loading process. *Price* v. *Norfolk & Western Railway*, 618 F.2d 1059, 1061 (4th Cir. 1980), also involved an employee whose work related to loading and unloading of vessels.

formed on the machinery and equipment of the shipyard are indivisible in purpose from the use of the equipment"); see also *Brown & Root, Inc.* v. *Joyner*, 607 F.2d 1087, 1089, 1090 n.5 (4th Cir. 1979) (noting that Board includes certain maritime construction workers in definition of "harbor workers"), cert. denied, 446 U.S. 981 (1980). Therefore, although we believe that the court of appeals' decision is erroneous, review by this Court is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 94-1267

In the Supreme Court of the United States
October Term, 1994

THOMAS C. PREVETIRE,

Petitioner,

v.

WEYHER/LIVSEY CONSTRUCTORS, INC., ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER IN OPPOSITION TO FEDERAL RESPONDENT AND EMPLOYER RESPONDENT

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QUESTION PRESENTED

Whether an employee involved in the construction of a steam and electrical power plant, whose primary purpose was to provide power for ship repair work at the Norfolk Naval Shipyard, is a "maritime employee" under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq.?

TABLE OF CONTENTS

REPLY BRIEF 1

ARGUMENT 2

Where the Fourth Circuit's decision was admittedly erroneous (by the Solicitor General) and it is clear that the decision will have a substantial impact on the future administration of the LHWCA, review by this Court is therefore warranted. 2

There is an implicit conflict between the decision below and this Court's decision in *Schwalb*, and therefore review by this Court is needed. 4

The Fourth Circuit's decision below remains in direct conflict with the decision of First Circuit in *Graziano*.. 6

The Fourth Circuit's decision below remains in conflict with its own prior decision in *Stewart/Joyner*. 9

CONCLUSION 13

TABLE OF AUTHORITIES

Cases:

Cafeteria & Restaurant Wkrs. U., Local 473 v. McElroy,
284 F.2d 173 (D.C. Cir. 1960) 12

Chesapeake & Ohio Ry. Co v. Schwalb,
493 U.S. 40, 107 L.Ed.2d 278,
110 S.Ct. 381 (1989) 4, 5

Graziano v. General Dynamics Corp.,
663 F.2d 340 (1st Cir. 1981) 6

Northeast Marine Terminal Co. v. Caputo,
432 U.S. 249 (1977) 4

P.C. Pfeiffer Co. v. Ford,
444 U.S. 69 (1979) 4

Stewart v. Brown and Root, Inc.,
7 BRBS 356 (1978),
aff'd. sub nom. Brown v. Joyner,
607 F.2d 1087, 11 BRBS 86
(4th Cir. 1979), *cert. denied*,
446 U.S. 981 (1980) 9, 12

Trotti & Thompson v. Crawford,
631 F.2d 1214 (1980) 7

Statutes:

Longshore and Harbor Workers' Compensation Act,
33 U.S.C. §902(3) 6

In the Supreme Court of the United States
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NO. 94-1267

THOMAS C. PREVETIRE,
Petitioner,

v.

WEYHER/LIVSEY CONSTRUCTORS, INC., ET AL.,
Respondents,

REPLY BRIEF FOR PETITIONER

Thomas C. Prevetire, by counsel, respectfully submits this REPLY BRIEF in opposition to the brief of the Federal Respondent, Solicitor General, Department of Justice, filed on March 29, 1995, and the brief of the Employer/Carrier Respondents, Weyher/Livsey Constructors, Inc., et al., filed on February 24, 1995.

ARGUMENT

I. Where the Fourth Circuit's decision was admittedly erroneous (by the Solicitor General) and it is clear that the decision will have a substantial impact on the future administration of the LHWCA, review by this Court is therefore warranted.

The Federal Respondent, the Solicitor General, accurately summarizes the erroneous decision made by the court of appeals below, however, to say that the decision below will not affect the future administration of the LHWCA is clearly wrong. The Fourth Circuit's decision will, indeed, have a significant impact on the administration of the LHWCA.

Shipyards and cargo terminals throughout the United States are continually expanding--building new fabrication shops, maintenance shops, administration buildings, etc. As the industry grows, shipyards will continue in the expansion, improvement, and maintenance of their facilities. The decision of the court of appeals below will be used to argue that those employees involved in such expansion projects within shipyards are not covered under the LHWCA. Those people involved in the creation, construction, fabrication, or erection of those facilities within the shipyard will be denied coverage under the Act based upon the Fourth Circuit's decision below which was admittedly erroneous (by the Solicitor General).

In fact, the stringent standard established in the decision below is already being used to deny coverage to a class of obviously covered maritime employees in the very same shipyard in question here. This law firm has been

contacted by a number of injured employees, whose primary work involves the "maintenance" of the same power plant Prevetire was constructing at the Norfolk Naval Shipyard, and are being denied jurisdiction under the LHWCA by their employer on the basis of the decision below. This decision is being used to deny coverage in those cases, and certainly more will follow.

By the facts in this case, the decision below is not just limited to a power plant in a Naval shipyard. Since the Fourth Circuit does not limit its holding so narrowly to the facts of this case, it will undoubtedly be used as a standard for denying future claims involving jurisdictional questions, certainly within its own circuit and throughout other circuits in the United States. Aside from New York City, the Hampton Roads area in Virginia, which falls within the jurisdiction of the Fourth Circuit, comprises the second largest port on the East Coast. In this regard, the Fourth Circuit considers a large amount of longshore cases and its decisions have a substantial impact on the administration of the LHWCA throughout the United States. The Fourth Circuit's decision below will affect many future LHWCA claims despite the fact that the decision was admittedly erroneous.

The Solicitor General also argues that "[t]he coverage question in this case arises in an unusual setting (a naval facility building its own power plant) and should directly affect few workers" (Federal Respondent's Brief "Fed.Brf." at 13). The fact that the facility in question is located on a Naval base does not make the present situation any different from that involving the private sector. Employees working for private employers in Naval shipyards are equally subject to the jurisdictional requirements under the LHWCA as those employees working for private shipyards. This case does not

involve an unusual setting. Since there are already additional cases involving this particular facility, it is reasonable to assume that there will be additional cases involving other shipyards and maritime facilities with their own internal source of power. Given the size of shipyards and the extensiveness of their operations, it would not be surprising that there would be at least a secondary, if not a primary, source of power within the shipyard. For the Solicitor General to argue that the Norfolk Naval Shipyard is an "unusual setting" and therefore the decision below would not have a significant impact on the enforcement of the LHWCA, is clearly a faulty analysis. The fact is that the Fourth Circuit's decision is already affecting subsequent compensation claims, will continue to influence future claims, and therefore, review by this Court is warranted.

II. There is an implicit conflict between the decision below and this Court's decision in *Schwalb*, and therefore review by this Court is needed.

This is not a case of first impression, as suggested by the Solicitor General, and there is an implicit conflict between the decision below and this Court's decision in *Chesapeake & Ohio Ry. Co v. Schwalb*, 493 U.S. 40, 107 L.Ed.2d 278, 110 S.Ct. 381 (1989). This Court in *Schwalb* held that "aside from the specified occupations, land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." 493 U.S. at 45. In discussing the *Schwalb* decision pertinent to the present case, the Solicitor General correctly notes that the "integral or essential part" test extends to "the 'overall process of loading and unloading a ship'" (Fed.Brf. at 7; citing *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82-83 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 265-279 (1977)). The Solicitor

General then concludes:

> . . . If, as the Court held in *Schwalb*, the Act extends coverage to work that is essential to longshore operations, but is not longshoring itself, there is no reason to doubt that the Act also covers employment that is essential to other activities specified in the Act, such as shipbuilding and ship repair.
>
> This Court's understanding of the purpose of the 1972 amendments to the LHWCA also supports a finding of coverage when a land-based activity is essential to shipbuilding or ship repair. . . **Coverage of all land-based employees whose work is essential to shipbuilding and ship repair ensures that workers in those industries, like those in longshoring, will not lose LHWCA benefits merely because of technological changes in their industries.**
>
> (Fed.Brf. at 8-9) (emphasis supplied).

The Solicitor General's conclusions in this regard are correct. The proper test in determining coverage under the LHWCA is whether the claimant's activities were integral or essential to any of the activities specified in Section 902(3), including shipbuilding and ship repair. The Solicitor General accurately concludes that under this test, the court of appeals below should have decided that Mr. Prevetire was engaged in maritime employment (Fed.Brf. at 9). However, it is interesting that the Solicitor General argues on the one hand that the decision below is not in conflict with this Court's decision in *Schwalb*, yet, on the other hand, concludes that the decision below was erroneous because the decision in

Schwalb, as interpreted, would extend coverage under the Act to Mr. Prevetire. There is an implicit conflict between the decision below and this Court's decision in *Schwalb* which must be remedied by this Court.

The court of appeal's decision was admittedly erroneous and its impact on the administration of the LHWCA is evident. The decision below restricts the jurisdictional requirements of the Act by concluding that a claimant involved in an activity essential or integral to the shipbuilding or ship repair process is not engaged in maritime employment. If Congress had intended to exclude such employees from coverage under the Act, it would not have included these specific activities in Section 2(3) of the Act. 33 U.S.C. §902(3) ("any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker"). The fact is that the decision below was simply wrong, and when the court of appeals denied coverage to Mr. Prevetire, the decision gave rise to an implicit conflict with this Court's opinion in *Schwalb*. The impact of that wrong decision is certain, for future claims within the Fourth Circuit and within the other circuits will be held to the same stringent standard that was required below. This Court must review the court of appeal's admittedly erroneous decision.

III. The Fourth Circuit's decision below remains in direct conflict with the decision of First Circuit in *Graziano*.

The Solicitor General and Respondent Employer argue that the decision below is not in conflict with the First Circuit's decision in *Graziano v. General Dynamics Corp.*, 663 F.2d 340 (1st Cir. 1981). In discussing the merits of *Graziano*, the Solicitor General asserts that the issue in

Graziano is different than in Prevetire's claim. The Solicitor General argues that the First Circuit considered whether an employee involved in the maintenance and repair of shipyard buildings and equipment was engaged in maritime employment, whereas the Fourth Circuit in the present case considered whether "a pipefitter 'employed in only the *construction* of a power plant (as distinguished from its later operation or maintenance)' met the status requirement." (Fed.Brf. at 11) (court's emphasis). However, this distinction between "construction" and "maintenance/repair" is not supported by the LHWCA, the well established case law interpreting the Act, nor by common sense. Indeed, the Fifth Circuit held in *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1220 (1980), that the initial construction of a pier cannot be distinguished from pier repair work for purposes of determining the maritime nature of employment. In addition, the Solicitor General even agreed that there is not a supportable distinction between construction and repair (Fed.Brf. at 12). Since there is no valid distinction between construction and maintenance/repair, the Solicitor General's argument here is without merit, and the conflict between *Graziano* and the decision below remains.

Respondent Employer also attempts to discredit the apparent conflict between the Fourth Circuit's decision below and the First Circuit's decision in *Graziano*. Respondent Employer cites to First Circuit's language in *Graziano*:

> [t]he maintenance of the structures housing shipyard machinery and in which shipbuilding operations are carried on is no less essential to shipbuilding than is the repair of the machinery itself . . . Graziano's maintenance and repair of shipyard facilities was essential to the building and repairing of ships . . .

> [T]he shipbuilding process would not have come to an immediate halt if Graziano's duties were not successfully discharged, but the failure to perform routine maintenance would have led eventually to a stoppage or curtailment of shipbuilding and repairs.
>
> (Respondent Employer's Brief "Emp.Brf" at 10).

Applying this rationale to the present case, Respondent Employer argues that "[t]he failure of Prevetire to perform the work in question would not have led to either a stoppage or a curtailment of the shipyard's operations." (Emp.Brf. at 10). Respondent Employer then concludes that Prevetire's work was not essential to the traditional maritime activities of shipbuilding, ship repair, or loading and unloading of ships, and therefore not entitled to coverage under the LHWCA.

Respondent Employer's conclusion in this regard is based upon an inaccurate statement of the facts. The evidence in the record indicates that the new power plant Prevetire was constructing was to replace the already existing but obsolete power generating facility. The older power plant was on its "last legs" and would have been ultimately shut down. The deposition of Mr. Durwood Curling, Executive Director of the Southeastern Public Service Authority, was part of the record before the Administrative Law Judge, the Benefits Review Board, and the Fourth Circuit Court of Appeals. Mr. Curling testified that the power generating facility at the shipyard was "outdated" and an "old, obsolete oil-fired power plant" (Court of Appeals' Appendix at 37). In addition, the deposition of Mr. Larry L. Howell, President of Weyher/Livsey Constructors, Inc., was part of the record. Mr. Howell specifically testified that "the

old plant was on its last legs and soon to be shut down and this plant would replace it." (Court of Appeals' Appendix at 17). Despite Respondent Employer's mischaracterization of the facts, the evidence indicates that the old power plant needed to be replaced, and therefore Prevetire's duties in constructing the new, more efficient power generating facility were essential to the ongoing operations at the shipyard. The failure of Prevetire to perform the work in question would certainly have led either to a stoppage or a curtailment of the shipyard's operations. It is, thus, evident that the opinion below remains in conflict with the decision in *Graziano* which must be clarified by this Court.

IV. The Fourth Circuit's decision below remains in conflict with its own prior decision in *Stewart/Joyner*.

Respondent Employer maintains that the decision in *Stewart v. Brown and Root, Inc.*, 7 BRBS 356 (1978), *aff'd. sub nom. Brown v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980), is not in conflict with the decision below. Respondent Employer contends that since the claimants in *Stewart/Joyner* were engaged in building a dry dock, the Fourth Circuit concluded that they were engaged in maritime employment. Respondent Employer cites to the *Stewart/Joyner* decision:

> We have held, under the earlier version of the Act, that employees building and repairing dry docks are engaged in maritime employment.
>
> (Emp.Brf. at 12).

In posing this argument, Respondent Employer has

mischaracterized the facts in *Stewart/Joyner*. The employer involved in that case, Brown & Root, Inc., was contracted by Newport News Shipbuilding to construct an entire addition to the shipyard. The expansion project did not include merely building a new dry dock, rather it included the construction of an administration building, a fabrication shop, a permanent dry dock, and other related areas such as craneways and assembly areas. To say that the court below in *Stewart/Joyner* only considered the construction of a dry dock is a misrepresentation of the facts. The truth is that Brown & Root was contracted to build an entire North yard of the shipyard. Respondent Employer is trying to narrowly read that case to avoid the obvious conflict created by the decision below.[1]

Respondent Employer also maintains that the court's decision in *Stewart/Joyner* differs from the decision below because the claimants in the former case were constructing a "traditional maritime facility", whereas the claimant in the present case was construction a power plant, "which is not a traditionally maritime facility." (Emp.Brf. at 13).
However, there is clearly an analogy between the support buildings and the shops constructed by Brown & Root and the power generating facility constructed by Weyher/Livsey in the present case. The new power plant, which sits along side those types of support buildings constructed in *Stewart/Joyner*, runs the entire Norfolk Naval Shipyard.

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[1] The Solicitor General also attempts to distinguish these two conflicting decision based on the idea that *Stewart/Joyner* involved a "dry dock" (Fed.Brf. at 13). As indicated above, Brown & Root was contracted to build an entire part of the shipyard, including fabrication shops, administration buildings, craneways and assembly areas. The distinction suggested by the Solicitor General is not based on an accurate reading of the facts.

How does one make a distinguish building the power plant in question, which is located a couple 100 yards from these buildings and which directly supplies power to the entire shipyard, from building a structure that simply houses employees doing fabrication work? How is one building structure more or less integral to the overall shipyard operations or more or less maritime in nature? It is a non-sensical distinction that is being drawn between the two.

Furthermore, building structures are not inherently maritime. If the same fabrication shop which was constructed in *Stewart/Joyner* at Newport News Shipyard was moved to Ohio and steel office furniture was being built, there would not be jurisdiction under the LHWCA. Likewise, if the same administration building which was constructed in *Stewart/Joyner* was moved to a steel yard in Ohio, there equally would not be jurisdiction under the LHWCA. The "inherent" qualities of the building are illusive when detached from the purpose to which the structure is to be put. There is nothing "inherently maritime" about a fabrication shop that would distinguish it from a power generating plant. It is a building which by its use and location is an essential part of and integral to the overall shipyard operations. The work being performed is "maritime work" because it involves the shipbuilding process. Equally, the primary purpose of the power plant in question was to run the entire shipyard, to supply the power to the shipyard, which included the administration buildings, the offices, the shops, and the dry docks. The power plant in the present case is inextricably integrated to the ongoing process of shipbuilding and ship repair. Take it away and the maritime work stops.

The Fourth Circuit's decision in *Stewart/Joyner* is clearly at odds with the decision below. It was specifically

held in *Stewart/Joyner* that:

> For future application of the "status" test, at least those persons directly involved in the **construction**, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships) will be deemed "harborworkers" within the meaning of Section 2(3) of the Act.
>
> 7 BRBS at 365 (emphasis supplied).

The fact remains that the decision in the present case is irreconcilably in conflict with *Stewart/Joyner*. The Solicitor General asserts that it is primarily the duty of the court of appeals to resolve its internal difficulties (Fed.Brf. at 12). However, review by this Court may be granted to resolve the admittedly erroneous decision below and indisputable conflict contained therein. *See generally Cafeteria & Restaurant Wkrs. U., Local 473 v. McElroy*, 284 F.2d 173, 190-191, n.8 (D.C. Cir. 1960), citing *Hearing and Rehearing Cases In Banc, D.C.*, 14 F.R.D. 91, 96-97.

CONCLUSION

For these reasons, and for the reasons stated in the initial brief of Petitioner, this petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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